No. 89-1717-CSY
Status: GRANTED

Title: Florida, Petitioner
v.
Terrance Bostick

Docketed:
April 26, 1990

Court: Supreme Court of Florida

Counsel for petitioner: Fowler,Joan

Counsel for respondent: Ayer,Donald B.

NOTE: Add $100 rec'd 050790

Entry	Date	Note	Proceedings and Orders
1	Apr 26 1990	G	Petition for writ of certiorari filed.
3	Jun 5 1990		Order extending time to file response to petition until July 11, 1990.
4	Jul 10 1990		Brief of respondent Terrance Bostick in opposition filed.
5	Jul 10 1990	G	Motion of respondent for leave to proceed in forma pauperis filed.
6	Jul 11 1990		DISTRIBUTED. September 24, 1990
9	Sep 24 1990		Letter from petitioner received and distributed.
11	Sep 28 1990		REDISTRIBUTED. October 5, 1990
8	Oct 1 1990		Motion of respondent for leave to proceed in forma pauperis GRANTED.
12	Oct 9 1990		Petition GRANTED. Justice Souter OUT.
			**********
13	Nov 15 1990		Record filed.
		*	one vol.-Supreme Court of FL
14	Nov 19 1990		Brief amicus curiae of Americans for Effective law Enforcement, Inc. filed.
15	Nov 23 1990		Brief amicus curiae of United States filed.
16	Nov 26 1990		Joint appendix filed.
20	Nov 26 1990		Brief of petitioner Florida filed.
21	Dec 6 1990	G	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
19	Dec 17 1990		SET FOR ARGUMENT TUESDAY, FEBRUARY 26, 1991. (1ST CASE)
22	Dec 19 1990		Brief amici curiae of ACLU, et al. filed.
23	Dec 26 1990		Brief of respondent filed.
24	Jan 7 1991		Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
26	Jan 10 1991		CIRCULATED.
27	Feb 26 1991		ARGUED.

89-1717

No. _____

IN THE
Supreme Court of the United States
October Term, 1989

STATE OF FLORIDA,

Petitioner,

v.

TERRANCE BOSTICK,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE FLORIDA SUPREME COURT

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April 26, 1990

QUESTION PRESENTED

May the police, without violating the fourth amendment, board an interstate bus and ask for, and receive, consent to search a passenger's luggage where they advise the passenger that he has the right to refuse?

TABLE OF CONTENTS

TABLE OF CITATIONS

No. _____

IN THE

Supreme Court of the United States

October Term, 1989

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OPINIONS BELOW

The opinion of the Supreme Court of Florida is reported at 554 So.2d 1153 (Fla. 1989). The State's petition for rehearing was denied on January 29, 1990. (Pet. App. A)

The opinion of the District Court of Appeal, Fourth District of Florida, is reported at 510 So.2d 321. (Pet. App. B)

Bostick was one of six cases presenting the same issue of law. The other five cases were decided by the Florida Supreme Court by citation to the principle of law established in *Bostick.* These other five cases were initially reported at *State v. Avery,* 531 So.2d 182 (Fla. 4th DCA 1988); *Mendez v. State,* 534 So.2d 774 (Fla. 4th DCA 1988); *McBride v. State,* 535 So.2d 692 (Fla. 4th DCA 1988); *Serpa v. State,* 541 So.2d 799 (Fla. 4th DCA 1989); and *Shaw v. State,* 543 So.2d 469 (Fla. 4th DCA 1989), in the Fourth District Court of

Appeal (Pet. App. B) and at *McBride v. State*, 554 So.2d 1160 (Fla. 1988); *Mendez v. State*, 554 So.2d 1161 (Fla. 1989); *Avery v. State*, 555 So.2d 1160 (Fla. 1989); *Serpa v. State*, 555 So.2d 1210 (Fla. 1989); and *Shaw v. State*, 555 So.2d 351 (Fla. 1989), in the Florida Supreme Court. (Pet. App. C)

JURISDICTION

The Supreme Court of Florida issued its opinion on November 30, 1989, and denied rehearing on January 29, 1990. This Court has jurisdiction. 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Amendment IV, *United States Constitution* provides in pertinent part:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause . . .

Amendment XIV, Section 1, *United States Constitution* provides in pertinent part:

> . . . nor shall any state deprive any person of life, liberty, or property, without due process of law . . .

Article I, Section 12, *Florida Constitution*[1] provides:

> The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, and against the unreasonable interception of private communication by any means, shall not be violated. No warrant shall be issued except upon probable cause, supported by affidavit, particularly describing the place or places to be searched, the person or persons, thing or things to be seized, the communication to be intercepted, and the nature of evidence to be obtained. This right shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court. Articles or information obtained in violation of this right shall not be admissible in evidence if such articles or information would be inadmissible under decisions of the United States Supreme Court construing the 4th Amendment to the United States Constitution.

STATEMENT OF THE CASE

As part of drug interdiction programs, police departments in Broward and Palm Beach Counties, Florida, have a policy whereby police officers routinely but randomly board interstate buses and trains during scheduled stops. The police are prominently identified as such, advise passengers they are engaged in drug interdiction, request consent to search, and advise passengers that they may refuse consent.

A panel of the Fourth District Court of Appeal affirmed the seizure of evidence found during a consensual search of a passenger's luggage in Broward County but certified as a question of great public importance to the Florida Supreme Court:

> MAY THE POLICE WITHOUT ARTICULABLE SUSPICION BOARD A BUS AND ASK AT RANDOM, FOR, AND RECEIVE, CONSENT TO SEARCH A PASSENGER'S LUGGAGE WHERE THEY ADVISE THE PASSENGER THAT HE HAS THE RIGHT TO REFUSE CONSENT TO SEARCH?

This decision was reported as *Bostick v. State,* 510 So.2d 321 (Fla. 4th DCA 1987). (Pet. App. B)

Subsequently, a trial court in adjacent Palm Beach County found the police policy or practice to be inherently coercive and suppressed contraband seized during such a consensual search. In *State v. Avery,* 531 So.2d 182 (Fla. 4th DCA 1988)(Pet. App. B), the Fourth District Court of Appeal, sitting *en banc,* canvassed the applicable law and the specific facts and circumstances of the case and determined that there was no *per se* constitutional bar to the police policy or practice of boarding buses and trains and randomly requesting consent for such searches. The Court held that the specific facts and circumstances surrounding the incident did not show that the consent to search was coerced. Accordingly, the district court reversed the suppression order and again certified a question of great public importance to the Florida Supreme Court of whether the evidence should be suppressed "as 'coerced' upon the sole ground that the officer(s) boarded a bus (or other public transport) and randomly sought consent from passengers."

Relying on the *Avery* decision, panels of the Fourth District subsequently upheld consensual searches and seizures in a series of similar cases reported as *McBride v. State,* 535 So.2d 692 (Fla. 4th DCA 1988); *Mendez v. State,* 534 So.2d 774 (Fla. 4th DCA 1988); *Serpa v. State,* 541 So.2d 799 (Fla. 4th DCA 1989); and *Shaw v. State,* 543 So.2d 469 (Fla. 4th DCA 1989)(Pet. App. B).

Subsequently, the Florida Supreme Court accepted *Bostick, Avery, Mendez, McBride, Serpa* and *Shaw* for review. *Bostick* was treated as the lead case. The court decided that the police policy and practice of routinely boarding buses and trains and randomly seeking consent to search luggage was inherently coercive, which constituted a seizure and violated the fourth amendment prohibition against

unreasonable searches and seizures. Based on this bright line rule, the court suppressed the evidence in all six cases reported as *Bostick v. State,* 554 So.2d 1153 (Fla. 1989)(Pet. App. A); *Avery v. State,* 555 So.2d 1160 (Fla. 1989)(Pet. App. C); *McBride v. State,* 554 So.2d 1160 (Fla. 1989)(Pet. App. C); *Mendez v. State,* 554 So.2d 1161 (Fla. 1989)(Pet. App. C); *Serpa v. State,* 555 So.2d 1210 (Fla. 1989)(Pet. App. C); and *Shaw v. State,* 555 So.2d 351 (Fla. 1989)(Pet. App. C). The State of Florida's petition for rehearing (Pet. App. A) was denied on January 29, 1990.

REASON FOR GRANTING THE WRIT

THE POLICE MAY, WITHOUT VIOLATING THE FOURTH AMENDMENT, BOARD A BUS AND ASK FOR, AND RECEIVE, CONSENT TO SEARCH A PASSENGER'S LUGGAGE WHERE THEY ADVISE THE PASSENGER THAT HE HAS THE RIGHT TO REFUSE.

The terms of Article I, section 12 of the Florida Constitution, explicitly make the search and seizure provision of the state constitution congruent with those of the United States Constitution. The decision here thus rests on the United States Constitution and decisions of this Court control the issue.

The decision below holds that the fourth amendment prohibits police from boarding buses and trains during scheduled stops and seeking consent of passengers to search their luggage. This decision conflicts with decisions of this Court, decisions of the United States Courts of Appeals, and decisions of the appellate courts of other states.

This Court has held that properly conducted consensual searches are constitutionally permissible, that the question of whether a consent is voluntary is a question of fact to be determined from the totality of circumstances on a case-by-case basis, that there is no requirement to advise the person of the right to refuse consent, and that the fourth and fourteenth amendments do not discourage citizens from cooperating with and aiding police to the utmost of their abilities in apprehending criminals. *Schneckloth v. Bustamonte,* 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973). The right of the police to approach citizen passengers and request consent to conduct searches of their persons and luggage has been specifically recognized in the context of

public transportation facilities. *United States v. Mendenhall,* 446 U.S. 544, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980); *reh'g denied,* 448 U.S. 908, 100 S.Ct. 3051, 65 L.Ed.2d 1138 (1980); *Florida v. Royer,* 460 U.S. 491, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983); *Florida v. Rodriguez,* 469 U.S. 1, 105 S.Ct. 308, 83 L.Ed.2d 165 (1984). The critical importance of obtaining citizen cooperation in drug interdiction was clearly delineated in *United States v. Berry,* 670 F.2d 583, 594 (5th Cir. 1982):

> The interest of the government in terminating drug smuggling is, on the one hand, very substantial. The toll on our society in lives made wretched, in costs to citizens, and in profits of gross size funneled to the most odious criminals, is staggering. *See Mendenhall, supra,* 446 U.S. at 561-62, 100 S.Ct. at 1881 (Powell, J., concurring in part and concurring in the judgment); *United States v. Oates,* 560 F.2d 45, 59 (2d Cir. 1977). Compounding this burden is the difficulty in interdicting a drug trade carried on by highly organized and sophisticated syndicates that are exceptionally well funded and are dealing in an easily transportable, easily hidden commodity. Informing our police that they cannot approach citizens to enlist their voluntary support in ending this trade may be tantamount to preventing its interdiction at all.

The dissent in *Bostick* by Justice Grimes recognized and stated the controlling law:

> (GRIMES, J., dissenting) I admit to a certain amount of discomfort in the prospect of the police routinely boarding stopped buses to inquire of the passengers whether they will consent to a search of their luggage. However, I know of no legal

principle which would justify this Court in declaring the practice to be per se illegal.

The police are at liberty to approach an individual in a public place to ask him questions if the person is willing to listen. *Florida v. Royer,* 460 U.S. 491 (1983). Such an encounter only becomes a seizure if the person is detained without reasonable objective grounds for doing so. *United States v. Mendenhall,* 446 U.S. 544 (1980). The majority's suggestion that Bostick could not have felt free to leave and that in any event there was no place to go except to get off the bus is misplaced. On the facts of this case, the controlling question is whether a reasonable person would have felt free to terminate the encounter, given the totality of the circumstances. *Id.* The United States Supreme Court has said that there is no "litmus paper test" to be applied in distinguishing an encounter from a seizure. *Royer.*

In *Immigration & Naturalization Service v. Delgado,* 466 U.S. 210 (1984), the Supreme Court held that the Immigration and Naturalization Service had neither detained nor seized employees who were questioned during "factory surveys" seeking to locate illegal aliens, even though the exits were "guarded" by some agents, while other agents, armed and with walkie talkies, dispersed systematically throughout the factories to question employees. Any employees giving unsatisfactory responses to the agents' questions were then asked to produce immigration papers voluntarily. The Court stated that " '[o]nly when the officer, by means of physical force or show of authority, has restrained the liberty of a citizen may we conclude

that a "seizure" has occurred.' " *Id.* at 215 (quoting *Terry v. Ohio,* 392 U.S. 1, 19 n.16 (1968)).

The position I take is similar to that expressed by six of the nine judges of the Fourth District Court of Appeal in the en banc decision of *State v. Avery,* 531 So.2d 182, 185-86 (Fla. 4th DCA 1988):

> Law enforcement officers are not restricted from boarding buses or other public transportation with the permission of the operator. Being lawfully present, they are free to communicate with the passengers. The location where an encounter takes place — whether on a bus, in a terminal, or in a room — is certainly a factor that the trial court should consider in weighing a motion to suppress. *See I.N.S. v. Delgado; Florida v. Royer; United States v. Mendenhall.* But the determination of whether there has been a seizure, or merely an encounter which a reasonable person would feel free to terminate, remains a question of fact to be determined from the totality of the circumstances.

Whether there has been a voluntary consent is a question to be determined from the totality of the circumstances. *Royer; Mendenhall; Schneckloth v. Bustamonte,* 412 U.S. 218 (1973). The extent to which a passenger may be intimidated by the police boarding a bus and seeking permission to check his luggage properly bears on whether the consent to search has been voluntarily given. But the ultimate question of whether the consent was voluntary is a question of fact. In this case the trial

judge found that the consent to search had been voluntarily given.

I respectfully dissent. (OVERTON and McDONALD, JJ., Concur).

Because of geography and other factors, Florida is a major pipeline for illegal drugs and, thus, a particularly critical area in the nation's, and especially Florida's, efforts to combat drug smuggling. The bright line rule adopted by the *Bostick* court severely restricts the ability of police to interdict illegal drug shipments in public transportation facilities. Contrary to the decision below, the fourth amendment does not prohibit consensual encounters between police officers and citizens on intercity and interstate buses and trains.

The decision below directly conflicts with the approach taken by federal appellate courts in cases which are factually and legally indistinguishable from *Bostick*. *See, e.g., United States v. Blake,* 888 F.2d 795, (11th Cir. 1989), a case arising out of Broward County, Florida, where state police officers approached two travelers, obtained consent for a search, and seized contraband. Although the contraband was later suppressed because the scope of the consent was exceeded, the analytical approach and the propositions of law relied on directly conflict with the *Bostick* bright line rule. See legal analysis at 798:

> It has long been recognized that police officers, possessing neither reasonable suspicions nor probable cause, may nonetheless search an individual without a warrant so long as they first obtain the voluntary consent of the individual in question. *Schneckloth v. Bustamonte,* 412 U.S. 218, 92 S.Ct. 2041, 36 L.Ed.2d 854 (1973).
>
> * * *

> Whether a suspect voluntarily gave consent to a search is a question of fact to be determined by the totality of the circumstances.
>
> * * *
>
> The determination as to whether a suspect's consent is voluntary is not susceptible to neat talismanic definitions; rather, the inquiry must be conducted on a case-by-case analysis.
>
> *Id.*

Blake and *Bostick* illustrate the ultimate conflict. The constitutional propriety of actions of a Broward County deputy sheriff depends entirely on whether the subsequent criminal prosecution takes place in federal or state court, i.e., the fourth amendment has one meaning in federal court and a conflicting meaning in a Florida court. There is no discernible explanation for this conflict inasmuch as the Florida Constitution, by its terms, provides that United States Supreme Court decisions will control the application of the Florida constitutional provisions in searches and seizures. *See, also, United States v. Tavolucci,* 895 F.2d 1423 (D.C. Cir. 1990), where the court upheld the seizure of evidence and the right of the police to approach travelers on an interstate train, just as they could approach persons on streets and other public places.

The conflict also extends to appellate authorities in other state jurisdictions. In *State v. Christie,* 385 S.E.2d 181 (N.C. 1989), the Charlotte Police Department routinely boarded buses from "source cities." Without any reasonable suspicion or probable cause, the police asked passengers to consent to searches of luggage. Contrary to *Bostick,* the issue of consent was correctly analyzed using the totality of circumstances and case-by-case approach set out in the *Schneckloth* line of cases. The circumstances of *Christie* do not differ in any significant manner from those of *Bostick*.

The bright line rule of the Florida Supreme Court prohibiting the police from boarding interstate and intercity buses and trains and obtaining consent to search luggage is directly contrary to controlling case law from this Court and conflicts with decisions of federal and state appellate courts. The conflict and split in authority presents an untenable and erroneous interpretation of the fourth amendment and warrants review by this Court.

CONCLUSION

In view of the conflict of the decisions below with past decisions of this Court and the importance of the issue to national drug interdiction efforts, the Court may wish to consider summary reversal.

Respectfully submitted,

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APPENDIX

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TABLE OF CONTENTS

APPENDIX A

Supreme Court of Florida

Terrance Bostick,

Petitioner,

vs. Case No. 70,996

State of Florida,

Respondent.

(BARKETT, J.) We have for review *Bostick v. State*, 510 So.2d 321 (Fla. 4th DCA 1987), in which the district court certified the following question to be of great public importance:[1]

> May the police without articulable suspicion board a bus and ask at random, for, and receive consent to search a passenger's luggage where they advise the passenger that he has the right to refuse consent to search?

Id. at 322. We rephrase the question as follows:

> Does an impermissible seizure result when police mount a drug search on buses during scheduled stops and question boarded passengers without articulable reasons for doing so, thereby obtaining consent to search the passenger's luggage?

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1 We have discretionary jurisdiction under article V, section 3(b)(4), Florida Constitution.

We answer the certified question in the affirmative and quash the opinion of the district court.

The facts in this case are succinctly stated by Judge Letts in his dissenting opinion[2] below:

> Two [Broward County sheriff's] officers, complete with badges, insignia and one of them holding a recognizable zipper pouch, containing a pistol, boarded a bus bound from Miami to Atlanta during a stopover in Fort Lauderdale. Eyeing the passengers, the officers admittedly without articulable suspicion, picked out the defendant passenger and asked to inspect his ticket and identification. The ticket, from Miami to Atlanta, matched the defendant's identification and both were immediately returned to him as unremarkable. However, the two police officers persisted and explained their presence as narcotics agents on the lookout for illegal drugs. In pursuit of that aim, they then requested the defendant's consent to search his luggage. Needless to say, there is conflict in the evidence about whether the defendant consented to the search of the second bag in which the contraband was found and as to whether he was informed of his right to refuse consent. However, any conflict must be resolved in favor of the state, it being a question of fact decided by the trial judge.

Id. (Letts, J., dissenting in part, footnote omitted).

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2 The majority of the district court below issued a per curiam affirmance, but agreed to certify the question. Bostick v. State, 510 So.2d 321, 321-22 (Fla. 4th DCA 1987). Thus, the majority did not recite the facts of the case.

The issue in this case arises out of the perpetual conflict between, on one hand, the right of an individual to be free from governmental interference and, on the other hand, the need of the government to ensure the safety of its citizens. We start with the premise that every natural person has the inalienable right to live his or her life unimpeded by others. Each individual has the right to choose whether and with whom he or she will share personal information, conversation, or any other interaction personal to oneself. This right of personal autonomy or privacy, however, is forfeited when an individual acts to harm another. Thus, when the state has reason to believe that an individual has committed a crime, the state has the power to interfere with that individual's autonomy through a seizure or a search. However, this power must be exercised within certain constitutional constraints.

One such constraint is article I, section 12 of the Florida Constitution, and its counterpart, the fourth amendment of the United States Constitution. Both guarantee the right to be free from unreasonable searches and seizures, and both apply to all "seizures" of the person, including arrests and brief detentions. In the words of *Terry v. Ohio*, 392 U.S. 1, 19 n. 16 (1968), they apply to those situations when an "officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen." As Justice Stewart wrote in *United States v. Mendenhall*, 446 U.S. 544 (1980) (plurality opinion):

> [A] person has been "seized" within the meaning of the Fourth Amendment only, if, in the view of all the circumstances surrounding the incident, a reasonable person would have believed he was not free to leave.

Id. at 554 (footnote omitted). A majority of the Court has since embraced this formulation. *Immigration and Naturalization Serv. v. Delgado,* 466 U.S. 210, 228 (1984).

The purpose of this admittedly imprecise test is clear: "to assess the coercive effect of police conduct, taken as a whole, rather than to focus on particular details of that conduct in isolation." *Michigan v. Chesternut,* 108 S.Ct. 1975, 1979 (1988). Thus, a seizure is not limited to physical custody but may be effected by "the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person or citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled." *Mendenhall,* 446 U.S. at 554.

Against the backdrop of this imprecise definition of "seizure," the courts have established a continuum by which to gauge police activity alleged to constitute an improper seizure. From this continuum have come three broad lines of case law.

The first deals with the most severe seizures, most often described as "arrests." Full-fledged arrest, usually resulting in an indefinite detention of the person, is justified only when probable cause exists. *Dunaway v. New York,* 442 U.S. 200, 208 (1979). "Probable cause" means that the circumstances are such as to cause a person of reasonable caution to believe that an offense has been or is being committed by the person to be arrested. *Id.* at 208 n. 9. The "totality of the circumstances" must yield "a particularized suspicion . . . that the particular individual being stopped is engaged in

wrongdoing."[3] *United States v. Cortez,* 449 U.S. 411, 418 (1981). Moreover, the stop must have been "justified at its inception." *United States v. Sharpe,* 470 U.S. 675, 682 (1985)(citation omitted).

The second line of cases deals with the less severe intrusions upon personal rights caused by brief, investigatory stops. Such stops fall into several categories. In *Terry,* for instance, the United States Supreme Court recognized that police may briefly stop and question those reasonably suspected of committing or about to commit a crime and frisk those reasonably suspected of carrying a weapon. *Terry,* 392 U.S. at 27. The rationale of *Terry* was that the brief intrusion upon an individual under these circumstances was counterbalanced by the government's interest in ensuring the safety of its police officers and of the public in general.

The basic rationale in *Terry* has been extended to other contexts. The Court, for example, has used it to justify brief automobile stops when police had articulable suspicion that illegal aliens were present. *Cortez,* 449 U.S. at 421. The same rationale underlies a number of decisions permitting brief stops in airport terminals of persons engaging in out-of-the-ordinary acts that usually indicate trafficking in

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3 It is irrelevant what label the government or its agents attach to a particular seizure. *Every* seizure bearing the attributes of an arrest is unreasonable and thus unlawful unless supported by probable cause, Michigan v. Summers, 452 U.S. 692, 700 (1981), even if only for the purpose of custodial interrogation. Dunaway v. New York, 442 U.S. 200 (1979).

illicit drugs.[4] *E.g., United States v. Sokolow,* 109 S.Ct. 1581 (1989).

The third line of cases involves those situations in which an individual actually consented to the police intrusion upon his or her personal rights. In these cases, the individual clearly understood that he or she could decline the police contact and continue on. If an individual chooses to speak with police and ultimately consents to a search, no "seizure" has occurred. Thus, the state has not engaged in coercion, and no fourth amendment violation exists. For instance, neither the state nor federal constitutions are offended when agents of the state approach an individual on the street or in another public place, ask questions without intimidation, and offer the *voluntary* answers to those questions into evidence in a criminal prosecution. *Florida v. Rodriguez,* 469 U.S. 1, 5-6 (1984); *Florida v. Royer,* 460 U.S. 491, 497 (1983).

In the present case, the state contends that the initial contact by Officers Nutt and Rubino never rose to the level of a stop or detention that implicated Bostick's fourth amendment interests. What did occur, the state argues, was a consensual encounter meeting all the criteria for voluntariness prescribed under *Schneckloth v. Bustamonte,* 412 U.S. 218 (1973), and *Norman v. State, 379 So.2d 643 (Fla. 1980).*

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4 However, Terry v. Ohio, 392 U.S. 1 (1968), requires reasonable suspicion of specific wrongdoing. For instance, the Court has found unreasonable some investigatory stops based on mere presence in a neighborhood frequented by drug users, Brown v. Texas, 443 U.S. 47, 51-52 (1979), random spot checks on the public highway, Delaware v. Prouse, 440 U.S. 648, 661 (1979), the fact that a person appears to be Mexican, United States v. Brignoni-Ponce, 422 U.S. 873 (1975), and dragnets, Davis v. Mississippi, 394 U.S. 721, 726-27 (1969).

We disagree. We find, first, that Bostick in fact was "seized" by the officers and, second, that any consent he gave to search his luggage was not free from the taint of the illegal detention.

We have no doubt that the Sheriff's Department's standard procedure of "working the buses" is an investigative practice implicating the protections against unreasonable seizures of the person. U.S. Const. amend. IV; art. I, § 12, Fla. Const. There is no doubt that these protections extend to the traveling public, *see Carroll v. United States,* 267 U.S. 132, 154 (1925), including those who travel in vehicles, *Brinegar v. United States,* 338 U.S. 160, 176-77 (1949), or vehicles for hire. *See, e.g., Rios v. United States,* 364 U.S. 253 (1960) (involving taxicab). The passenger, as Professor LaFave has observed, "shares with the driver a privacy interest in continuing his travels without governmental intrusion." 3 W. LaFave, *Search and Seizure* § 11.3(e), at 571 (1978). *See also,* J. Choper , Y. Kamisar § L. Tribe, *The Supreme Court; Trends and Developments 1978-79* 160-61 (1978). Moreover, there is a well-established privacy interest in the luggage one carries during travels. *United States v. Chadwick,* 433 U.S. 1, 13 (1977); *United States v. Hernandez-Salazar,* 813 F.2d 1126, 1136 (11th Cir. 1987)(quoting *United States v. Goldstein,* 635 F.2d 356, 361 (5th Cir.), *cert. denied,* 452 US. 962 (1981)); *State v. Wells,* 539 So.2d 464, 468 (Fla.)(on rehearing), *cert. granted,* 109 S.Ct. 3183 (1989).

There also is no doubt that the setting in which the challenged police conduct occurs may provide strong evidence of a "seizure." As noted in *Chesternut,* 108 S.Ct. at 1979, "what constitutes a restraint on liberty prompting a person to conclude that he is not free to 'leave' will vary, not only with the particular police conduct at issue, but also with the setting in which the conduct occurs." The crucial question is whether, under all the circumstances, a reason-

able person would have believed he was not free to leave. *Mendenhall,* 446 U.S. at 554.

Here, the circumstances indicate that the officers effectively "seized" Bostick. Officer Nutt testified that he and Officer Rubino, wearing raid jackets clearly identifying them as sheriff's officers, approached Bostick during the course of the bus's momentary layover in Fort Lauderdale. Bostick, who was resting on a bag in the rearmost seat, was asked to produce his identification and indicate his destination. During questioning, Officer Nutt stood in a position that partially blocked the only possible exit from the bus. At the time, Bostick testified that Officer Nutt had his hand in a black pouch that appeared to contain a gun. Because Bostick was enroute to Atlanta, he could not leave the bus, which was soon to depart. He had only the confines of the bus in which to move about, had he felt the officers would let him do so.

Under such circumstances a reasonable traveler would not have felt that he was "free to leave" or that he was "free to disregard the questions and walk away." *Mendenhall,* 446 U.S. at 554. There was, in fact, no place to which a reasonable traveler might leave and no place to which he or she might walk away. The fact that the officers partially blocked the aisle and that one appeared to carry a gun only underscored this conclusion. Even the trial court in the proceeding below concluded that this situation was "very intimidating" for Bostick. For all intent and purpose, Bostick was detained by the activities of Officers Nutt and Rubino. Although, this detention did not rise to the level of an "arrest," it nevertheless constituted a lesser form of "seizure" of Bostick's person.

Other Florida cases involving the same Broward County policy support this conclusion. For example, under very similar facts in *Alvarez v. State,* 515 So.2d 286 (Fla. 4th DCA 1987), the Fourth District made the following comment

about the Sheriff's Department's activities in boarding Amtrak trains in Fort Lauderdale:

> [The defendant] was not in a public terminal, but rather had already boarded the train and begun his journey. To leave in the sense contemplated by Terry and Mendenhall would have required him to abandon the comfort of the sleeping berth he had paid for, and, were he to leave the train entirely, to miss his destination. His only other option was to ask the officers to leave.

Id. at 289. Thus, the Fourth District concluded that the police activity in *Alvarez* was "the functional equivalent of detention for purposes of determining the voluntary nature of the subsequent consent." *Id.* We agree with this analysis.

Since we have found a detention of Bostick, we must determine its propriety. The broad principles of federal law, as well as the specific requirements of Florida law, require that the police in this instance at a minimum must have had a reasonable articulable suspicion before they detained Bostick. *Sokolow; Cortez;* art. I, § 12, Fla. Const. There must be "specific articulable facts, together with rational inferences from those facts, that reasonably warrant suspicion" of crime. *Brignoni-Ponce,* 422 U.S. at 844.

In this instance, the state concedes that it lacked any basis for suspecting illegal activity whatsoever. Thus, our inquiry is at an end. There were no articulable facts and no rational inferences to support the police activity here. The detention of Bostick was unlawful and unjustified.

Having decided that the initial confrontation was unlawful, we next consider whether Bostick's subsequent consent to search his luggage overcame the taint of the illegal police conduct. We find that it does not. As we stated in *Norman v. State,* 379 So.2d 643 (Fla. 1980):

> [W]hen consent is obtained after illegal police search or arrest, the unlawful police action presumptively taints and renders involuntary any consent to search. *The consent will be held voluntary only if there is a clear and convincing proof of an unequivocal break in the chain of illegality sufficient to dissipate the taint of prior illegal action.*

Id. at 646-7 (citations omitted, emphasis added). *Accord Bailey v. State*, 319 So.2d 22 (Fla. 1975); *State v. Martin*, 532 So.2d 95 (Fla. 4th DCA 1988); *Alvarez*, 515 So.2d at 286; *Elsleger v. State*, 503 So.2d 1367 (Fla. 4th DCA), dismissed, 511 So.2d 298 (Fla. 1987); *State v. Blan*, 489 So.2d 865 (Fla. 1st DCA 1986); *Harris v. State*, 483 So.2d 111 (Fla. 2d DCA 1986); *Tennyson v. State*, 469 So.2d 133 (Fla. 5th DCA 1985). No such clear and convincing proof exists upon this record. Indeed, the trial judge expressed his own belief that he considered the "whole picture . . . very intimidating even if there is consent." It is clear that the trial court used the wrong standard in judging this issue. An "intimidating" environment cannot be said to have broken the chain of illegality even under a less exacting standard of proof than that dictated by *Norman* and its progeny. Thus, although the judge's finding of fact normally comes to this Court with a presumption of correctness, the presumption must fail in this instance.

Accordingly, we find under the circumstances presented here, government has exceeded its power to interfere with the privacy of an individual citizen who is not even suspected of any criminal wrongdoing. Indeed, the unlawful intrusion upon privacy that occurred here is eloquently described by Judge Andrews, as quoted in *State v. Kerwick*, 512 So.2d 347 (Fla. 4th DCA 1987), when he confronted the same Broward County Sheriff's policy in dispute in this case:

> "[T]he evidence in this cause has evoked images of other days, under other flags, when no man traveled his nation's roads or railways without fear of unwarranted interruption, by individuals who held temporary power in the Government. The spectre of American citizens being asked, by badge-wielding police, for identification, travel papers — in short a *raison d'etre* — is foreign to any fair reading of the Constitution, and its guarantee of human liberties. This is not Hitler's Berlin, nor Stalin's Moscow, nor is it white supremacist South Africa. Yet in Broward County, Florida, these police officers approach every person on board buses and trains ('that time permits') and check identification, tickets, ask to search luggage — all in the name of 'voluntary cooperation' with law enforcement — to the shocking extent that just one officer, Damiano, admitted that during the previous nine months, he, himself, had searched *in excess* of three thousand bags! In the Court's opinion, the founders of the Republic would be thunderstruck."

Id. at 348-49 (quoting Judge Andrews, emphasis in original).

We agree. The intrusion upon privacy rights caused by the Broward County policy is too great for a democracy to sustain. Without doubt the inherently transient nature of drug courier activity presents difficult law enforcement problems. Roving patrols, random sweeps, and arbitrary searches or seizures would go far to eliminate such crime in this state. Nazi Germany, Soviet Russia, and Communist Cuba have demonstrated all too tellingly the effectiveness of such methods. Yet we are not a state that subscribes to the notion that ends justify means. History demonstrates that the adoption of repressive measures, even to eliminate a clear evil, usually results only in repression more mindless and terrifying than the evil that prompted them. Means

have a disturbing tendency to become the end result. And as Judge Glickstein noted in his dissent in *Snider v. State*, 501 So.2d 609, 610 (Fla. 4th DCA 1986):

> Occasionally the price we must pay to make innocent persons secure from unreasonable search and seizure of their persons or property is to let an offender go. Those who suffered harassment from King George III's forces would say that is not a great price to pay. So would residents of the numerous totalitarian and authoritarian states of our day.

For the foregoing reasons, we answer the certified question as rephrased in the affirmative. The opinion below is quashed, and we remand for further proceedings consistent with the opinion.

It is so ordered. (EHRLICH, C.J., and SHAW and KOGAN, JJ., Concur. McDONALD, J., Dissents with an opinion in which OVERTON and GRIMES, JJ., Concur. GRIMES, J., Dissents with an opinion, in which OVERTON and McDONALD, JJ., Concur)

(McDONALD, J., dissenting) One cannot complain of a search if he voluntarily consents to it. The majority, among other things, concludes that the consent given here is the result of coercion per se under the circumstances. I reject that view and conclude that whether there is a free and voluntary consent is a question of fact to be decided by the trial judge.

I totally disagree that there had been a seizure of Bostick and the logic of holding him to be seized completely escapes me.

To many the practice of police boarding a bus seeking evidence of transportation of drugs is distasteful. I can accept that, but find nothing illegal about it so long as there were no overt acts of threat or intimidation in the procurement of a consent to search. The entire war on drugs is distasteful and society should accept some minimal inconvenience and minimal incursion on their rights of privacy in that fight.

I would affirm Bostick's conviction. I would approve the decision of *State v. Avery*, 534 So.2d 182 (Fla. 4th DCA 1988). (OVERTON and GRIMES, JJ., Concur.)

(GRIMES, J., dissenting.) I admit to a certain amount of discomfort in the prospect of the police routinely boarding stopped buses to inquire of the passengers whether they will consent to a search of their luggage. However, I know of no legal principle which would justify this Court in declaring the practice to be per se illegal.

The police are at liberty to approach an individual in a public place to ask him questions if the person is willing to listen. *Florida v. Royer*, 460 U.S. 491 (1983). Such an encounter only becomes a seizure if the person is detained without reasonable objective grounds for doing so. *United States v. Mendenhall*, 446 U.S. 544 (1980). The majority's suggestion that Bostick could not have felt free to leave and that in any event there was no place to go except to get off the bus is misplaced. On the facts of this case, the controlling question is whether a reasonable person would have felt free to terminate the encounter, given the totality of the circumstances. *Id.* The United States Supreme Court has said that there is no "litmus paper test" to be applied in distinguishing an encounter from a seizure. Royer.

In *Immigration & Naturalization Service v. Delgado*, 466 U.S. 210 (1984), the Supreme Court held that the Immigra-

tion and Naturalization Service had neither detained nor seized employees who were questioned during "factory surveys" seeking to locate illegal aliens, even though the exits were "guarded" by some agents, while other agents, armed and with walkie talkies, dispersed systematically throughout the factories to question employees. Any employees giving unsatisfactory responses to the agents' questions were then asked to produce immigration papers voluntarily. The Court stated that "[o]nly when the officer, by means of physical force or show of authority, has restrained the liberty of a citizen may we conclude that a "seizure" has occurred.'" *Id.* at 215 (quoting *Terry v. Ohio,* 392 U.S. 1, 19 n.16 (1968)).

The position I take is similar to that expressed by six of the nine judges of the Fourth District Court of Appeal in the en banc decision of *State v. Avery,* 531 So.2d 182, 185-86 (Fla. 4th DCA 1988):

> Law enforcement officers are not restricted from boarding buses or other public transportation with the permission of the operator. Being lawfully present, they are free to communicate with the passengers. The location where an encounter takes place — whether on a bus, in a terminal, or in a room — is certainly a factor that the trial court should consider in weighing a motion to suppress. *See I.N.S. v. Delgado; Florida v. Royer; United States v. Mendenhall.* But the determination of whether there has been a seizure, or merely an encounter which a reasonable person would feel free to terminate, remains a question of fact to be determined from the totality of the circumstances.

Whether there has been a voluntary consent is a question to be determined from the totality of the circumstances.

Royer; Mendenhall; Schneckloth v. Bustamonte, 412 U.S. 218 (1973). The extent to which a passenger may be intimidated by the police boarding a bus and seeking permission to check his luggage properly bears on whether the consent to search has been voluntarily given. But the ultimate question of whether the consent was voluntary is a question of fact. In this case the trial judge found that the consent to search had been voluntarily given.

I respectfully dissent. (OVERTON and McDONALD, JJ., Concur.)

IN THE

Supreme Court f Florida

TERRANCE BOSTICK,

Petitioner,

vs. Case No. 70,996

STATE OF FLORIDA,

Respondent.

MOTION FOR REHEARING

Respondent, State of Florida, by and through undersigned counsel, moves this Honorable Court for rehearing and clarification pursuant to Rule 9.311, Fla.R.App.P.[1]

It is respectfully submitted that the Court has misapprehended and misapplied the Fourth Amendment provisions concerning search and seizure as definitively interpreted by controlling United States Supreme Court decisions. Although the Court's opinion does not acknowledge the relationship, article I, section 12 of the Florida Constitution, by its terms, is congruent with the Fourth Amendment, as interpreted by the United States Supreme Court.

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1 As a matter of background, it must be recalled that *Bostick* was one of six cases certified to be of great public importance by the Fourth District Court of Appeal *en banc*. These cases arose out of three different law enforcement jurisdictions and involved facts unique to each case. We urge reconsideration of each case on its merits.

Three preliminary points deserve clarification. First, the certified question of great public importance, on which this Court's jurisdiction is based, asked:

> May the police without articulable suspicion board a bus and ask at random for, and receive, consent to search a passenger's luggage where they advise the passenger that he has the right to refuse consent to search?

It is this question which the parties briefed. For reasons which are not given, and which are not readily apparent, this Court rephrased the question as follows and answered the rephrased question in the affirmative.

> Does an impermissible seizure result when police mount a drug search on buses during scheduled stops and question boarded passengers without articulable reasons for doing so, thereby obtaining consent to search the passengers' luggage?

For purposes of clarity, the state asks that the purpose of the rephrasing be stated. Was the original question too broad? Is the affirmative answer to the rephrased question also applicable to the original question, which the parties briefed and on which this Court's jurisdiction is based? The state suggests that the original question accurately, succinctly, and neutrally states the precise question presented by these cases. With all respect, the state suggests that the rephrased question demands an affirmative answer. The state agrees that an impermissible seizure results when police mount a search without articulable reasons.

Second, it is a common practice for legal advocates to present a court with a parade of horribles when urging a court to rule in their favor. It is not unusual, assuming the parade of horribles is credible, for a court to rely on that parade of horribles in its decision. Nevertheless, the state

strongly suggests that this Court's acceptance, endorsement and statement of an analogy between the depraved barbarisms of Nazi Germany, Soviet Russia, Communist Cuba and Florida policemen attempting to combat drug trafficking by requesting citizen consent to search luggage is totally unsupported by the records here. While there may be overfevered persons or groups who believe there is a Nazi or Communist under every bed and that anyone who disagrees with their point of view fits into one of the categories, the state suggests that such hyperbole has no place in a reasoned discourse of a constitutional rule of law in a court of law in these United States. The analogy totally lacks credibility and demeans the millions of victims of the depraved barbarism of Nazism and communism, the police themselves, and citizens who support the efforts of the police. Moreover, such grossly unfair and incredible arguments contribute nothing, other than emotional atmospherics, to the constitutional question presented by these cases. Unfortunately, the analogy has already been spread on the public record but the state suggests it is inappropriate to further spread it on in the record and to permanently memorialize it in the pages of the Southern Reporter. Accordingly, the state requests that the Court clarify its view by rejecting the analogy.

Third, respondent seeks clarification of the following portion of the Court's opinion:

> Thus, although the judge's finding of fact normally comes to this court with a presumption of correctness, the presumption must fail in this instance. (Slip opinion, p. 9).

Respondent respectfully submits that this Court has overlooked *McNamara v. State,* 357 So.2d 410 (Fla. 1978), in reaching this conclusion. As Justice Anstead noted in his dissent to *Avery,* 531 So.2d at 195-99:

> Initially, I disagree simply because the majority failed to honor the fundamental rule of appellate review that reviewing courts must interpret the evidence and reasonable inferences therefrom in a manner most favorable to sustain the trial court's ruling. *McNamara v. State,* 357 So.2d 410 (Fla. 1978). In contrast to the evaluation of the evidence and conclusion reached by the trial judge, the majority opinion evaluates the evidence and makes a factual finding that the alleged consent obtained by the police after boarding a bus and confronting appellant was not coerced. In essence the majority substituted its own view of the evidence for that of the trial judge. Hence in the guise of criticizing the trial court's alleged adoption of a bright line rule concerning such searches, the majority has itself adopted a bright line rule approving as a matter of law all such bus searches.

Judge Anstead's scholarly analysis applies with equal force to the majority's opinion in this case.[2] We urge clarification of the impact of this decision on *McNamara* because like Judge Anstead, respondent views this as a *fundamental* concern which is as critical to the successful functioning of an appellate court system as the majority thinks its limits on police activity are critical to the functioning of democracy.

Turning to the primary point, it is respectfully submitted that the Court has misapprehended the sharp constitutional distinction between a police officer's investigatory stop or arrest of a person and an approach to a citizen for voluntary assistance. As Professor LaFave states in his

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2 And equally to Judge Mount's ruling at the trial level in *Avery. Id.* at 531 So.2d 187 (Headnote four).

treatise[3] on search and seizure:

> Thus, if the ultimate issue is perceived as being whether the suspect "would feel free to walk away" then virtually all police-citizen encounters must in fact be deemed to involve a Fourth Amendment seizure. The *Mendenhall-Royer* standard should not be given such a literal reading as to produce such a result. (Footnote omitted).

LaFave's view is similar to that of Judge Phillip Hubbart of the Third District Court of Appeal, a Fourth Amendment expert in his own right. Discussing a pre-*Royer* airport encounter, Hubbart surmised:

> It is true that a reasonable person, innocent of any crime, might have felt, out of a sense of politeness and civic duty, that he ought to cooperate with the officer and agree to the officer's request which, in fact, the defendant did. That is a far cry, however, from concluding, as the defendant urges, that he had no choice in the matter and was compelled to stop and answer questions whether he liked it or not. We cannot so conclude as, in our view, such common social amenities and pressures do not and cannot in themselves amount to an official restraint on personal liberty. (Citation omitted).

Justice Adkins noted in *Lightbourne v. State*, 438 So.2d 380 (Fla. 1983), that the critical focus should be on whether ". . . the average reasonable person, under similar circumstances would not find the officer's actions *unduly harsh*." *Id.* at 387-388. (Emphasis added).

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3 *Search and Seizure, A Treatise on the Fourth Amendment*, Second Edition, Section 9.2(H), page 411.

Contrary to these views, this Court now bans police officers from talking to citizens who are boarding buses, airplanes, or trains and prohibits any police-citizen encounter in a narrow alleyway, crowded theater, or other small space as a matter of law. Clarification is necessary because such a ruling is directly contrary with *State v. Christie*, 385 So.2d 181 (N.C. Ct. Appeals, November 7, 1989)(copy attached), and *United States v. Whitehead*, 849 F.2d 849 (4th Cir. 1988), *cert. denied*, ___ U.S. ___, 109 S.Ct. 534, 102 L.Ed.2d 566 (1988), cited therein; and *United States v. Sokolow*, 490 U.S. ___, 109 S.Ct. 1581, 104 L.Ed.2d 1 (1989)("the reasonableness of an officer's decision . . . does not turn on the availability of less intrusive investigatory techniques.") and cannot withstand federal scrutiny.

Despite lip service to *United States v. Mendenhall*, 446 U.S. 544, 100 S.Ct. 1870, 64 L.Ed.2d 497, *reh'g denied*, 448 U.S. 908, 100 S.Ct. 3051, 65 L.Ed.2d 1138 (1980), and its standard of fact-based review, the Court has announced a brightline prohibition against all police conduct in certain areas. Although the Court has cited Judge Letts' dissenting opinion in the instant case, it has apparently overlooked his later special concurrence in *State v. Avery*, 534 So.2d 182 (Fla. 4th DCA 1988), wherein he states:

> As was noted in the dissent in *Bostick* quoting *Royer*, there is no litmus test to distinguish between a consensual encounter and a seizure. Likewise in *Mendenhall*, it is clear that whether it is a consensual encounter or a seizure requires consideration of the individual facts and circumstances of each incident. It would appear, therefore, that we cannot adopt a per se rule, unless we are to make a distinction between the quality of freedom to leave in a bus station vis-a-vis a bus.

> I am also concerned about the several courts' dogged persistence that the result is dictated by freedom to leave. Clearly that is what has been said, but I fancy that freedom to terminate the interview will prove to be a better test. One about to embark, or continue on a journey is not in my view reasonably free to leave and abandon the journey.

Id. at 531 So.2d 188. Yet, this Court's majority narrows that rule today. In doing so, it apparently overlooks what the United States Supreme Court, in another search and seizure case, has described as "'[t]he most basic function of any government . . . to provide for the security of the individual and of his property.' *Miranda v. Arizona*, 384 U.S. 436, 539 (1966)(White, J., dissenting." *Illinois v. Gates*, 462 U.S. 213, 237 (1983). There is no constitutional prohibition against police appearing on public transportation facilities and requesting consent of citizens to search their luggage. Whether in a given case the police coerce the consent is a fact-bound question which cannot be answered except by examination of the peculiar facts of the particular case. In ruling as a matter of law that the police may not request consent, the court has misapprehended and misapplied controlling case law from the United States Supreme Court.

Respectfully submitted,

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_____/s/_____

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Supreme Court of Florida

Monday, January 29, 1990

TERRANCE BOSTICK,

Petitioner, Case No. 70,996

vs. District Court of Appeal
4th District

STATE OF FLORIDA, No. 4-86-2409

Respondent.

Respondent's Motion for Rehearing filed in the above cause is hereby denied.

EHRLICH, C.J., SHAW, BARKETT and KOGAN, JJ., Concur. OVERTON, McDONALD, and GRIMES, JJ., dissent.

_____/s/_____
SID J. WHITE
Clerk, Supreme Court

APPENDIX B

Terrance BOSTICK, Appellant,

V.

STATE of Florida, Appellee.

No. 4-86-2409

District Court of Appeal of Florida
Fourth District.

April 8, 1987.

On Motion for Rehearing July 22, 1987.

PER CURIAM.

AFFIRMED.

LETTS, WALDEN and STONE, JJ., concur.

ON PETITION FOR REHEARING

PER CURIAM

The Petition for Rehearing is denied on the authority of *Rodriguez v. State*, 494 So.2d 496 (Fla. 4th DCA 1986) and *Elsleger v. State*, 503 So.2d 1367 (Fla. 4th DCA 1987). Notwithstanding this affirmance, we deem the cause now before us to be of great public importance and we certify the following question to the Supreme Court:

MAY THE POLICE WITHOUT ARTICULABLE SUSPICION BOARD A BUS AND ASK AT RANDOM, FOR, AND RECEIVE, CONSENT TO

SEARCH A PASSENGER'S LUGGAGE WHERE THEY ADVISE THE PASSENGER THAT HE HAS THE RIGHT TO REFUSE CONSENT TO SEARCH?

WALDEN and STONE, JJ., concur.

LETTS, J., concurs in part and dissents in part.

LETTS, J., dissenting in part:

I concur in the decision to certify the question. I otherwise dissent.

This appeal evolves from police activity on a bus in the form of a random request for consent to search a passenger's luggage without articulable suspicion. The trial judge, though he orally expressed reservations, denied, without comment, the motion to suppress the evidence of contraband discovered in the luggage. Inherently, the trial judge's order was tantamount to a holding that a consensual police encounter took place rather than an illegal intrusion equivalent to a seizure. I dissent.

Two police officers, complete with badges, insignia[1] and one of them holding a recognizable zipper pouch, containing a pistol, boarded a bus bound from Miami to Atlanta during a stopover in Fort Lauderdale. Eyeing the passengers, the officers admittedly without articulable suspicion, picked out the defendant passenger and asked to inspect his ticket and identification. The ticket, from Miami to Atlanta, matched the defendant's identification and both were immediately returned to him as unremarkable. However, the two police officers persisted and explained their presence as narcotic agents on the lookout for illegal drugs. In pursuit of that

1 Their dress was "casual" over which they donned clearly marked "raid" jackets before entering the bus.

aim, they then requested the defendant's consent to search his luggage. Needless to say, there is conflict in the evidence about whether the defendant consented to the search of the second bag in which the contraband was found and as to whether he was informed of his right to refuse consent. However, any conflict must be resolved in favor of the state, it being a question of fact decided by the trial judge.

I am uncomfortable with a scenario such as this and I have extensively studied two United States Supreme Court opinions, cited hereafter, in search of counsel and guidance. With the utmost respect, I have some trouble reconciling these two decisions and I do not find them entirely consistent with one another. Certainly, their results are opposite. However, while I am fully conscious of, and will quote from, *United States v. Mendenhall,* 446 U.S. 544, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980), I am primarily persuaded by *Florida v. Royer,* 460 U.S. 491, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983), which is the most recent of the two and which I believe supports my conclusion.

Royer teaches that there is no litmus test for distinguishing between a consensual encounter and a seizure in violation of the Fourth Amendment. Accordingly, the endless variations in facts and circumstances of each case make it "unlikely that the courts can reduce to a sentence or a paragraph a rule that will provide unarguable answers...." *Id.* 103 S.Ct. at 1329. However, the circumstances of *Royer* do provide a basis for comparison with the controversy now before us.

The facts of *Royer* were:

1. The initial approach was by plainclothes policemen in an airport concourse, not on an actual plane.

2. The police displayed no weapons.

3. The defendant's ticket and I.D. did not match.

4. The defendant became noticeably nervous during the conversation.

5. The defendant was told he was suspected of transporting narcotics.

6. The defendant's ticket and I.D. were not returned to him making it clear, as the *Royer* court held, that he was not free to leave.

7. The defendant was requested to and did accompany the two policemen to a small enclosed room (described by law enforcement as "a large storage closet" equipped with a desk and two chairs.

8. His checked luggage was retrieved without his consent and brought to the small room.

9. He did not give his consent to the search when first approached ("on the spot" as defined by the Royer court), but only after being taken to the room and interrogated.

By contrast, the facts of the instant case reveal that:

1. The initial approach in Fort Lauderdale was by uniformed police on the actual bus in which the defendant was in transit from Miami to Atlanta.

2. There was display of a weapon.

3. The defendant's ticket and I.D. did match.

4. There is nothing in the record denoting nervousness on the defendant's part.

5. The defendant was not told that he was suspected of transporting narcotics.

6. The defendant's ticket and I.D. were immediately returned to him.

7. The defendant was not requested to leave the bus or to accompany the police officers anywhere.

8. No checked luggage was retrieved.

9. The defendant gave his consent to search "on the spot."

Obviously, some of the above enumerated facts in Royer favor a consensual encounter while others reflect a seizure. In the same vein, factors pro and con exist in the case at bar. Yet, it is clear that in *Royer* the overriding consideration was whether the defendant could reasonably believe he was free to leave. In deciding he was not free to do so, the *Royer* court, quoting our Third District Court of Appeal, made much of the confinement in the small room as "an almost classic definition of imprisonment" *Id.* 103 S.Ct. at 1323. The *Royer* court further cited as evidence that he was not free to leave, the failure by the police to return the defendant's ticket and their retrieval and possession of his luggage. True, in the case at bar, there was no retention of a ticket nor was any of the luggage impounded prior to the request for consent to search it. Further, there was obviously no interrogation room to which the defendant was transported. Nevertheless, as the court held in *Mendenhall,* the test for the presence of a seizure is whether "in view of all of the circumstances surrounding the incident a reasonable person would have believed he was not free to leave." *Id.* 100 S.Ct. at 1877. In helping to define circumstances which would indicate the passenger was not free to leave, *Mendenhall* cites examples, among others, such as the presence of more than one officer, the display of a weapon, and in a subsequent paragraph, the wearing of uniforms. *Id.* at 1877. All three of these examples, illustrative of seizure, are present in the instant case. Moreover, my version of common

sense tells me that a paid and ticketed passenger will not voluntarily forfeit his destination and get up and exit a bus in the middle of his journey, during a temporary stopover, while two policemen, one with a pouched gun in his hand, are standing over him in a narrow aisle asking him questions and requesting permission to search his luggage. It is not a question of whether he actually was *free* to leave, as all of us trained lawyers know he was. The test is whether a layman would reasonably be expected to believe he was free to leave under these circumstances. I conclude he was not.

My having decided that the defendant was not free to leave, it follows that the police questioning under the facts of this case constituted an illegal detention and a seizure. In the words of the *Royer* court, since the defendant "was being illegally detained when he consented to the search of his luggage, we agree that the consent was tainted by the illegality and was ineffective to justify the search." *Id.* 103 S.Ct. at 1329.

Nor do I find that the State has sustained its burden of establishing that any such taint was rendered harmless by a subsequent unequivocal break in the chain connecting the original seizure with the ensuing consent to search. On the contrary, the consent to search was given immediately upon the heels of the illegal detention and no measurable break in the chain took place. *See Elsleger v. State,* 503 So.2d 1367 (Fla. 4th DCA 1987), and *Brown v. Illinois,* 422 U.S. 590, 95 S.Ct. 2254, 45 L.Ed.2d 416 (1975).

In conclusion, as I have already said, quoting from the United States Supreme Court on the subject, there is no available litmus test and my dissenting opinion is therefore confined to the totality of the facts and circumstances now before this court.

I WOULD REVERSE.

STATE of Florida, Appellant,

v.

Adrian Avery, Appellee.

No. 87-0270.

District Court of Appeal of Florida,
Fourth District.

Aug. 3, 1988.

Rehearing En Banc Denied
Oct. 12, 1988.

Defendant charged with possession of cocaine moved to suppress. The Circuit Court, Palm Beach County, Marvin U. Mounts, Jr., J., granted motion, and State appealed. The District Court of Appeal, Stone, J., held that public bus passenger's consent to luggage search was not "coerced," though police had boarded bus solely for purpose of randomly seeking such consent from passengers.

Reversed and remanded; question certified.

Letts, J., concurred specially and filed opinion.

Glickstein, J., concurred as to the certified question and dissented with opinion.

Anstead, J., dissented and filed opinion.

EN BANC.

STONE, Judge.

This is an appeal from an order granting a motion to suppress. Avery, a bus passenger, consented to a search by the police of his luggage, which was found to contain cocaine.

The trial court determined that the consent was coerced. Its order provided:

> Officer Chris Fahey testified that he and Officer Turner, both of the West Palm Beach Police Department comprised a unit which checked the Trailways Bus Station looking for people who might be acting as couriers for drugs northbound. They along with a dog trained to sniff for drugs would visit the bus station on a random basis for the purpose of checking northbound buses.
>
> On July 26, 1986 at approximately 8:10 p.m., they boarded a bus stopped in West Palm Beach bound for Dallas. They were not in uniform but their badges were prominently displayed and they wore windbreakers which designated the department.
>
> They proceeded to the rear of the bus and began interviewing passengers in an effort to gain their consent to search their luggage.
>
> Officer Turner's attention was drawn to Mr. AVERY because he appeared nervous and used his feet to push his tote bag under the seat. It is noted that Mr. AVERY is a large man. As a result of Mr. AVERY's actions, he was subjected to the officer's questioning.
>
> Officer Turner testified that he obtained the oral consent of Mr. AVERY to look through his baggage that was underneath his seat. The officers were aware that their Department had a written consent to search form but they didn't feel it was necessary to use such a form because it would take too much time and they couldn't do it for all passengers on board or something to that

> effect. Further testimony indicated that a consent form might be executed once a search had been completed and the suspect under arrest.
>
> The prospect of being a seated passenger on a commercial public transportation vehicle and seeing police officers come on board with their badges prominently displayed checking each passenger is an intimidating and coercive situation in and of itself.
>
> I find that if consent was given in this case it was coerced by the situation I have just described. Furthermore, I find that the Defendant's actions did not give rise to a founded suspicion which would justify his detention. *Ingram v. State,* 364 So.2d 821 (Fla. 5th [4th] DCA 1978); *Robinson v. State,* 388 So.2d 286 (Fla. 1st DCA 1980); *Horvitz v. State,* 433 So.2d 545 (Fla. 4th DCA 1983); *Gorney v. State,* 409 So.2d 220 (Fla. 4th DCA 1982).

This opinion is entered en banc because we consider the issue to be of exceptional importance.[1] We conclude that the trial court erred in determining that the defendant's consent was coerced, and reverse.

Whether consent is voluntary is a question to be determined from the totality of the circumstances. *See Florida v. Royer,* 460 U.S. 491, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983); *United States v. Mendenhall,* 446 U.S. 544, 100 S.Ct. 1870, 64 L.Ed.2d 497, *reh'g denied,* 448 U.S. 908, 100 S.Ct. 3051,

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1 This appeal may also appropriately be considered en banc is order to maintain uniformity in this court's decisions to the extent that any language in *Hunter v. State,* 518 So.2d 304 (Fla. 4th DCA 1987), and *Alvarez v. State,* 515 So.2d 286 (Fla. 4th DCA 1987), may be inconsistent with this opinion.

65 L.Ed.2d 1138 (1980); *Schneckloth v. Bustamonte,* 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973); *Denehy v. State,* 400 So.2d 1216 (Fla.1980).

In determining whether evidence may be excluded because it was obtained in the course of a warrantless search and seizure, we are obligated to follow the opinions of the Supreme Court of the United States. Art. I, § 12, Fla. Const.

In *Florida v. Royer,* 460 U.S. 491, 497-98, 103 S.Ct. 1319, 1324, 75 L.Ed.2d 229 (1983), the Supreme Court discussed the concept of an encounter between an officer and an individual:

> [L]aw enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions, by putting questions to him if the person is willing to listen, or by offering in evidence in a criminal prosecution his voluntary answers to such questions. *See Dunaway v. New York, supra,* 442 U.S., at 210, n.12, 99 S.Ct., at 2255, n. 12; *Terry v. Ohio,* 392 U.S., at 31, 32-33, 88 S.Ct., at 1885-1886 (Harlan, J., concurring); *id.,* at 34, 88 S.Ct., at 1886 (WHITE, J., concurring). Nor would the fact that the officer identifies himself as a police officer, without more, convert the encounter into a seizure requiring some level of objective justification. *United States v. Mendenhall,* 446 U.S. 544, 555, 100 S.Ct. 1870, 1877, 64 L.Ed.2d 497 (1980)(opinion of Stewart, J.). The person approached, however, need not answer any question put to him; indeed, he may decline to listen to the questions at all and may go on his way. *Terry v. Ohio,* 392 U.S. at 32-33, 88 S.Ct., at 1885-1886 (Harlan, J., concurring); *id.,* at 34, 88 S.Ct., at 1886 (WHITE, J., concurring). He may not be detained even momentarily without reasonable, objective grounds for doing so; and his refusal to listen or answer does not, without more, furnish these grounds. *United States v. Mendenhall, supra,* 446 U.S., at 556, 100 S.Ct., at 1878 (opinion of Stewart, J.). If there is no detention — no seizure within the meaning of the Fourth Amendment — then no constitutional rights have been infringed.

In this case, the defendant had not been "stopped" or "seized" as those terms are commonly understood. Nevertheless, if his consent to the search was "coerced," a motion to suppress should be granted, and the wrongfully obtained evidence excluded. *Schneckloth v. Bustamonte.*

Clearly, such evidence would not be suppressed if Avery had been similarly approached by these officers in an area of the bus station or platform rather than on the bus itself. *See, e.g., Florida v. Royer,* 460 U.S. 491, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983); *United States v. Mendenhall,* 446 U.S. 544, 100 S.Ct. 1870, 64 L.Ed.2d 497, *reh'g granted,* 448 U.S. 908, 100 S.Ct. 3051, 65 L.Ed.2d 1138 (1980); *Rosa v. State,* 508 So.2d 546 (Fla. 3d DCA), *reh'g denied,* 515 So.2d 230 (Fla. 1987); *Elsleger v. State,* 503 So.2d 1367 (Fla. 4th DCA), *dismissed,* 511 So.2d 298 (Fla. 1987); *State v. Champion,* 383 So.2d 984 (Fla. 4th DCA 1980).

The state contends that Avery's consent was given in the course of an "encounter." *See Florida v. Royer; United States v. Mendenhall; Terry v. Ohio,* 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). It is undisputed that there is no "litmus paper test" to be applied in distinguishing an "encounter" from a "seizure." *Florida v. Royer,* 460 U.S. at 506, 103 S.Ct. at 1329. The test is whether a reasonable person would feel free to terminate the encounter, given the totality of the

circumstances. *Mendenhall,* 446 U.S. at 557, 100 S.Ct. at 1879; *Schneckloth,* 412 U.S. at 227, 93 S.Ct. at 2048. In *I.N.S. v. Delgado,* 466 U.S. 210, 216-217, 104 S.Ct. 1758, 1762-63, 80 L.Ed.2d 247 (1984), the Supreme Court explained:

> Although we have yet to rule directly on whether mere questioning of an individual by a police official, without more, can amount to a seizure under the Fourth Amendment, our recent decision in *Royer, supra,* plainly implies that interrogation relating to one's identity or a request for identification by the police does not, by itself, constitute a Fourth Amendment seizure. In *Royer,* when Drug Enforcement Administration agents found that the respondent matched a drug courier profile, the agents approached the defendant and asked him for his airplane ticket and driver's license, which the agents then examined. A majority of the Court believed that the request and examination of the documents were "permissible in themselves." *Id.,* at 501, 103 S.Ct., at 1326 (plurality opinion), see *id.,* at 523, n. 3, 103 S.Ct., at 1337-1338, n. 3 (opinion of REHNQUIST, J.). In contrast, a much different situation prevailed in *Brown v. Texas,* 443 U.S. 47, 99 S.Ct. 2637, 61 L.Ed.2d 357 (1979), when two policemen physically detained the defendant to determine his identity, after the defendant refused the officer's request to identify himself. The Court held that absent some reasonable suspicion of misconduct, the detention of the defendant to determine his identity violated the defendant's Fourth Amendment right to be free from an unreasonable seizure. *Id.* at 52, 99 S.Ct. at 2641.

What is apparent from *Royer* and *Brown* is that police questioning, by itself, is unlikely to result in a Fourth Amendment violation. While most citizens will respond to a police request, the fact that people do so, and do so without being told they are free not to respond, hardly eliminates the consensual nature of the response. Cf. *Schneckloth v. Bustamonte,* 412 U.S. 218, 231-34, 93 S.Ct. 2041, 2049-51, 36 L.Ed.2d 854 (1973). Unless the circumstances of the encounter are so intimidating as to demonstrate that a reasonable person would have believed he was not free to leave if he had not responded, one cannot say that the questioning resulted in a detention under the Fourth Amendment. But if the persons [sic] refuses to answer and the police take additional steps — such as those in *Brown* — to obtain an answer, then the Fourth Amendment imposes some minimal level of objective justification to validate the detention or seizure. *United States v. Mendenhall,* 446 U.S., at 554, 100 S.Ct., at 1877; see *Terry v. Ohio,* 392 U.S., at 21, 88 S.Ct., at 1879.

Law enforcement officers are not restricted from boarding buses or other public transportation with the permission of the operator. Being lawfully present, they are free to communicate with the passengers. The location where an encounter takes place — whether on a bus, in a terminal, or in a room — is certainly a factor that the trial court should consider in weighing a motion to suppress. *See I.N.S. v. Delgado; Florida v. Royer; United States v. Mendenhall.* But the determination of whether there has been a seizure or merely an encounter which a reasonable person would feel free to terminate, remains a question of fact to be determined from the totality of the cirumstances. *I.N.S. v. Delgado; Florida v. Royer; United States v. Mendenhall; Schneckloth v. Bustamonte; Jacobson v. State,* 476 So.2d

508 So.2d 546 (Fla. 3d DCA), *rev. denied*, 515 So.2d 230 (Fla.1987); *Palmer v. State*, 467 So.2d 1063 (Fla. 3d DCA 1985); *State v. Grant*, 392 So.2d 1362 (Fla. 4th DCA), *rev. denied*, 402 So.2d 610 (Fla. 1981).

A person's consent to a search is not per se involuntary because obtained by law enforcement officers on board a commercial carrier such as a bus or other similar forms of transportation. *State v. Schwartzbach*, 513 So.2d 756 (Fla. 4th DCA 1987). Generally, physical surroundings alone, or even the fact that a defendant has been taken into custody, is not sufficient to constitute coercion and vitiate consent. *Cf. I.N.S. v. Delgado; United States v. Watkson*, 423 U.S. 411, 96 S.Ct. 820, 46 L.Ed.2d 598, *reh'g denied*, 424 U.S. 979, 96 S.Ct. 1488, 47 L.Ed.2d 750 (1976). In *Watson*, the defendant had been arrested immediately before consenting to a search of his car. The Supreme Court reversed a decision of the Court of Appeals which had directed that the evidence be suppressed because the defendant's prior arrest was, by itself, coercive, and because of a lack of proof that defendant knew he could withhold his consent to the search. The Supreme Court emphasized the applicability of the *Schneckloth* requirement that the defendant demonstrate that his consent to search "was not his own 'essentially free and unconstrained choice' because his 'will ha[d] been overborne and his capacity for self-determination critically impaired.' *Schneckloth v. Bustamonte*, 412 U.S. 218, 225, 93

S.Ct. 2041, 2047, 36 L.Ed.2d 854 (1973)" *Watson*, 423 U.S. at 424, 96 S.Ct. at 828.[2]

In *Delgado*, the Supreme Court held that the I.N.S. had neither detained nor seized employees who were questioned during "factory surveys" seeking to locate illegal aliens, notwithstanding that the exits were "guarded" by some agents, while other agents, armed and with walkie talkies, disbursed systematically throughout the factories to question employees. Those employees giving unsatisfactory responses to the agents' questions were then asked to voluntarily produce immigration papers. The Supreme Court noted that the Court of Appeals had followed the opinion written by Justice Stewart in *Mendenhall* in concluding that a reasonable worker would have believed that he was not free to leave. The court, following *Royer* and *Mendenhall*, determined that there was no basis for distinguishing the questioning that occurred at the guarded exits from that which occurred inside the factory. It concluded that there had been no seizures, and that these surveys were permissible encounters, despite a psychological environment in which the alien worker might be thought to be afraid that he or she was not free to leave. The majority opinion noted that the Supreme Court has been cautious in

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2 The dissent inquires whether the majority perceives no difference between consent given before and after boarding. There is obviously a factual difference which the trial court may consider in weighing the totality of the circumstances. The issue before this court is not whether the judges individually approve of the procedure in question, but whether it constitutes per se, coercion. A passenger on a crowded bus is not, as a matter of law, necessarily more threatened, or less free to say anything, or nothing, to the officer, than is the same individual, alone, on a station platform, in a hallway, in a room, or on a country road. For example, in *Rodriguez v. State*, 519 So.2d 1079 (Fla. 1st DCA 1988), the denial of a motion to suppress was affirmed where, after a highway traffic stop, an officer, on mere suspicion, sought and received valid consent to search the trunk.

defining the limits imposed by the Fourth Amendment, "given the diversity" of potential encounters between officers and citizens. The opinion reiterated the standard adopted in *Terry v. Ohio*, that "[o]nly when the officer, by means of physical force or show of authority, has restrained the liberty of a citizen may we conclude that a 'seizure' has occurred."

We note that even the random stopping of motor vehicles at roadblocks without cause has been found to pass constitutional muster when the detention procedure is designed to meet minimum standards. *See United States v. Martinez-Fuerte*, 428 U.S. 543, 96 S.Ct. 3074, 49 L.Ed.2d 1116 (1976); *State v. Jones*, 483 So.2d 433 (Fla. 1986).

We recognize that the ruling of the trial court on a motion to suppress comes to the appellate court with a presumption of correctness. *McNamara v. State*, 357 So.2d 410 (Fla.1978). However, that burden is overcome in this case by the showing that there was no evidence of misconduct. *See State v. Champion*, 383 So.2d 984 (Fla. 4th DCA 1980). *See also State v. Grant*, 392 So.2d 1362 (Fla. 4th DCA), *rev. denied*, 402 So.2d 610 (Fla.1981).

The order granting the motion to suppress in this case was not a resolution of the facts based upon a consideration of the totality of the circumstances. Rather, it is worded as a determination of law that consent to a luggage search by a passenger in a vehicle used for public transportation is "coerced" where the police board the vehicle solely for the purpose of randomly seeking such consent from the passengers.

Ordinarily, where there is no antecedent police misconduct, a consent to search need only be shown by a preponderance of the evidence. *See generally Denehy v. State*, 400 So.2d 1216 (Fla.1980); *Alvarez v. State*, 515 So.2d 286 (Fla. 4th DCA 1987); *Elsleger v. State*, 503 So.2d 1367 (Fla. 4th

DCA 1986); *dismissed*, 511 So.2d 298 (Fla.1987); *State v. Blan*, 489 So.2d 865 (Fla. 1st DCA 19986); *State v. Fuksman*, 468 So.2d 1067 (Fla. 3d DCA 1985). *See also Rodriguez v. State*, 519 So.2d 1079 (Fla. 1st DCA 1988); *Acosta v. State*, 519 So.2d 658, 661 n. 2 (Fla. 1st DCA 1988). However, the issue in this case is not what standard of proof to apply in determining the voluntariness of the consent to search, but whether the consent is the result of coercion per se under these circumstances.

The suppression of this otherwise admissible proof is not the result of any act of misconduct or improper communication by the authorities. The officers boarded the bus at the terminal. Their attention was drawn to Avery. They advised him of their purpose in questioning and seeking the cooperation of the passengers. They asked him if he would consent to the search of his luggage, and advised him that he could refuse. The defendant was not stopped, restrained nor otherwise detained. There were no weapons involved, and no inappropriate nor intimidating conduct or language was used. The defendant was not asked to move, nor was he physically prevented from moving. His ticket and license were not confiscated.

It is not argued that the trial court's decision was based on weighing credibility. The trial court did not dispute the state's evidence. The suppression was not based on the officer's failure to impart any warning or furnish any information to the defendant. The order assumes that Avery consented to the search and focuses on the "coercion" which the court deemed inherent in such a situation.

This court has previously affirmed orders denying motions to suppress evidence uncovered in a search conducted with the consent of bus passengers. *See Hunter v. State* 518 So.2d 304 (Fla. 4th DCA 1987); *Bostick v. State*, 510 So.2d 321 (Fla. 4th DCA 1987); *Snider v. State*, 501 So.2d 609 (Fla.

4th DCA 1986); *Rodriguez v. State,* 494 So.2d 496 (Fla. 4th DCA 1986). One need not be unsympathetic to the concerns of the experienced trial judge, or to those expressed by judges of this court in the concurring or dissenting opinions in *Bostick, Snider,* and *Hunter,* as well as those similarly expressed in *State v. Schwartzbach,* 513 So.2d 756 (Fla. 4th DCA 1987), *Alvarez v. State,* 515 So.2d 286 (Fla. 4th DCA 1987), and *State v. Carroll,* 510 So.2d 1133 (Fla. 4th DCA 1987), to recognize that trial courts should not apply a bright line standard in determining whether consent was coerced. *Cf. State v. Schwartzbach.*

We certify the following question to the supreme court as one of great public importance:

> MAY EVIDENCE, OBTAINED AS A RESULT OF DEFENDANT'S CONSENT TO SEARCH, BE SUPPRESSED BY THE TRIAL COURT AS "COERCED" UPON THE SOLE GROUND THAT THE OFFICER(S) BOARDED A BUS (OR OTHER PUBLIC TRANSPORT) AND RANDOMLY SOUGHT CONSENT FROM PASSENGERS?

We therefore reverse and remand for further proceedings.

HERSEY, C.J., and DOWNEY, DELL, WALDEN and GUNTHER, JJ., concur.

LETTS, J., concurs specially with opinion.

GLICKSTEIN, J., concurs with certified question and dissents with opinion.

ANSTEAD, J., dissents with opinion.

LETTS, Judge, concurring specially.

Judge Glickstein's call for a per se rule outlawing requests for consent to search in situations where there are no

articulable suspicions is beguiling, but at our level I doubt we are free to adopt it. As was noted in the dissent in *Bostick* quoting *Royer,* there is no litmus test to distinguish between a consensual encounter and a seizure. Likewise in *Mendenhall,* it is clear that whether it is a consensual encounter or a seizure requires consideration of the individual facts and circumstances of each incident. It would appear, therefore, that we cannot adopt a per se rule, unless we are to make a distinction between the quality of freedom to leave in a bus station vis-a-vis a bus seat.

I am also concerned about the several courts' dogged persistence that the result is dictated by freedom to leave. Clearly that is what has been said, but I fancy that freedom to terminate the interview would prove to be a better test. One about to embark, or continue, on a journey is not in my view reasonably free to leave and abandon the journey.

In the case at bar, had the trial judge concluded that the search was coercive under all the facts and circumstances, I would vote for affirmance. He did not do that, however, and instead adopted a per se coercive rule. While I have leanings in favor of such a rule, I believe he exceeded his prerogative under the case law.

Finally, my misgivings about this particular case are also assuaged by the fact that there may well have been an articulable suspicion present. There is unchallenged testimony that when the officers first boarded the bus, before any request to search was made, the defendant was very nervous, was "squirming" and "trying to conceal the bag under his seat."

GLICKSTEIN, Judge, concurring as to the certified question and dissenting as to the remainder.

I concur with certification of the question as one of great public importance. Otherwise, I dissent.

My thoughts on the present issue, having sprung initially during oral argument in *Snider v. State,* 501 So.2d 609 (Fla. 4th DCA 1986), were perhaps not very articulate in *State v. Carroll,* 510 So.2d 1133 (Fla. 4th DCA 1987), and *Hunter v. State,* 518 So.2d 304 (Fla. 4th DCA 1987). That is unfortunate, given the importance of the issue. Nevertheless, I now feel that only a per se rule will stop what is occurring. Without it, we shall be deciding these cases endlessly ad hoc, without any hope of uniformity. I base this conclusion on the history of "boarded passengers" cases in this court, which I list chronologically:

1. *Rodriguez v. State,* 494 So.2d 496 (Fla. 4th DCA 1986).

2. *Snider v. State, supra.*

3. *Bostick v. State* (I), the original PCA, issued April 8, 1987, but not reported in F.L.W.

4. *Hunter v. State* (I), the original opinion which was to be issued on April 22, 1987, and was pulled by Judge Anstead. It is quoted verbatim in my occurrence in *Hunter v. State* (II).

5. *Bostick v. State* (II), on rehearing, containing a certified question, 510 So.2d 321 (Fla. 4th DCA 1987).

6. *State v. Carroll, supra.*

7. *Alvarez v. State,* 515 So.2d 286 (Fla. 4th DCA 1987).

8. *State v. Schwartzbach,* 513 So.2d 756 (Fla. 4th DCA 1987).

9. *Hunter v. State* (II), *supra.*

I requested that Avery be decided en banc because I perceived the issue to be of great importance and the results to require uniformity. The majority of the judges agreed, but

the outcome of our en banc decision is the same as that of the majority on the original panel.

A specially concurring colleague doubts whether "at out level . . . we are free to adopt" a per se rule outlawing requests for consent to search absent an articulable suspicion. Unless this question has been directly addressed and decided otherwise by the United States Supreme Court or the Supreme Court of Florida, I know of no reason why this court, which for most causes coming before it is the court of last resort, may not state the law as it sees it. *Hoffman v. Jones,* 280 So.2d 431, 433-34 (Fla.1973), states merely that a district court of appeal may not overrule controlling precedent set down by the Florida Supreme Court; and we are aware of the effects of the 1982 amendment to article I, section 12 of the Florida Constitution.

Avery was the appropriate case to en banc. We now see that local police officers in South Florida are boarding interstate buses at stops in Broward and Palm Counties, knowing there is a stopover of no more than twenty and often no more than ten minutes, going to the rear of the passenger section, and proceeding to ask *every* passenger for consent to search their baggage. The so-called war on drugs may unwittingly have become a war upon a prized element of our democracy — the right to be let alone.

Judge Brandeis observed, "A judge rarely preforms his functions adequately unless the case before him is adequately presented." There appears to be little authority, however, that is factually on point. As a result, the trial judges and the judges on this court have used a variety of terms and expressions in framing and deciding the issues. In reviewing the court's records on this issue, I located authority in two *Bostick* briefs which I shared with the court at our en banc conference. One case, *United States v. Martinez-Fuerte,* 428 U.S. 543, 96 S.Ct. 3074, 49 L.Ed.2d

1116 (1976), discussed hereinafter, found its way into the en banc majority opinion, but the critical case *United States v. Brignoni-Ponce*, 42 U.S. 873, 95 S.Ct. 2574, 45 L.Ed.2d 607 (1975), did not.

A starting point, at least for me, is Justice Brennan's concurrence in *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), which defines the elements of a legitimate "stop." I have cited it in my concurrence in *In re Forfeiture of 1984 Toyota Pickup*, 501 So.2d 610 (Fla. 4th DCA 1986).

> *[A] police officer with reasonable suspicion of criminal activity, based on articulable facts,* may detain a suspect briefly for purposes of limited questioning and, in so doing, may conduct a brief "frisk" of the suspect to protect himself from concealed weapons.

(citations omitted) (emphasis added). 501 So.2d at 611. I then quoted the following language of Justice Brennan, to which I now add emphasis:

> *Terry* encounters must be brief; the suspect must not be moved or asked to move more than a short distance; physical searches are permitted only to the extent necessary to protect the police officers involved during the encounter; *and most importantly, the suspect must be free to leave after a short time* and to decline to answer the question put to him.
>
> "[T]he person may be briefly detained against his will while pertinent questions are directed to him. Of course, the person stopped is not obliged to answer, answers may not be compelled, and refusal to answer furnishes no basis for

> arrest, although it may alert the officer to the need for continued observation." *Id.*, at 34, 88 S.Ct., at 1886, (WHITE, J., concurring).
>
> Failure to observe these limitations converts a *Terry* encounter into the sort of detention that can be justified only by probable cause to believe that a crime has been committed. *See Florida v. Royer*, 460 U.S., at 501, 103 S.Ct., at 1326 (Opinion of WHITE, J.): *id.*, at 509-511, 103 S.Ct., at 1330 (opinion of BRENNAN, J.); *Dunaway v. New York*, 442 U.S., at 216, 99 S.Ct. at 2258.
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> 461 U.S. at 363-65, 103 S.Ct. at 1861-62, 75 L.Ed.2d at 912-14 [Footnotes omitted].

Id. at 612.

One deduces that the majority here believes one is free to leave a bus, train, airplane, or boat after boarding. Thus, in the *Avery* scenario, someone who has boarded the bus which was traveling from Dade County to Dallas, would be "free to leave" at a Broward County terminal, whereever they boarded or whatever their destination. Does the majority perceive no constitutional difference between an individual standing in a bus or train station, airport, or marina before getting aboard a conveyance, and one who has boarded a bus — particularly one who boarded it at an earlier stop? What if the bus driver collected one's ticket, or punched it, or kept part of it and gave the passenger a stub? Do the narrow aisles of interstate buses as readily as the broad corridors of an air terminal accommodate breaking off a gratuitous police encounter? *See Mendenhall* and *Royer*. Finally, is the next step to bring a drug dog aboard each bus to sniff all the luggage?

Earlier herein, I referred to my discussion at conference of *United States v. Martinez-Fuerte*, which contains a major distinction from *United States v. Brignoni-Ponce*. The latter case quoted *Terry* for the following proposition:

> [W]henever a police officer accosts an individual and restrains his freedom to walk away, he has "seized" that person.

Id. at 878, 95 S.Ct. at 2578. The court then said:

> *We are unwilling to let the Border Patrol dispense entirely with the requirement that officers must have a reasonable suspicion to justify roving patrol stops.*

(Footnote omitted)(emphasis added). *Id.* at 882, 95 S.Ct. at 2580. The court then pointed out a number of considerations which I feel have their counterparts in "boarded passenger" cases:

1. The roads near borders carry a large volume of legitimate traffic. So do buses.

2. Substantially all of the automobile traffic in large metropolitan areas is lawful. So is the travel of most bus passengers.

3. To approve roving patrol stops without suspicion that an automobile is carrying illegal immigrants would subject residents to potentially unlimited interference with highway use, solely at the discretion of Border Patrol Officers. Avery "stops" may not interdict highway use, but certainly interfere with relaxed travel by bus passengers.

4. Approval of random stops implies motorists may be questioned day or night, without any reason to suspect them. Random inquiries of bus passengers have a comparable result.

In *Martinez-Fuerte*, the court approved stops at *regular checkpoints* and acknowledged they were "seizures." It contrasted random stops, which it had earlier disapproved, because of grave danger that officers would abuse "unreviewable discretion." It took pains to point out that regular checkpoints do not take motorists by surprise. With the majority decision in *Avery*, why should not officers be able to stop automobiles at random and ask the same questions they are asking bus passengers?

Justice Brennan's dissenting concerns in *Martinez-Fuerte*, in which Justice Marshall joins, should be considered by the majority:

> Consistent with this purpose to debilitate Fourth Amendment protections, the Court's decision today virtually empties the Amendment of its reasonableness requirement by holding that law enforcement officials manning fixed checkpoint stations who make standardless seizures of persons do not violate the Amendment. This holding cannot be squared with this Court's recent decisions in *United States v. Ortiz*, 422 U.S. 891, 95 S.Ct. 2585, 45 L.Ed.2d 623 (1975); *United States v. Brignoni-Ponce*, 422 U.S. 873, 95 S.Ct. 2574, 45 L.Ed.2d 607 (1975); and *Almeida-Sanchez v. United States*, 413 U.S. 266, 93 S.Ct. 2535, 37 L.Ed.2d 596 (1973). I dissent.

Id. at 568-69, 96 S.Ct. at 3088, 49 L.Ed.2d at 1134-35. Further, he wrote:

> This defacement of Fourth Amendment protections is arrived at by a balancing process that overwhelms the individual's protection against unwarranted official intrusion by a governmental interest said to justify the search and seizure. But that method is only a convenient cover for condon-

> ing arbitrary official conduct, for the governmental interests relied on as warranting intrusion here are the same as those in *Almeida-Sanchez* and *Ortiz*, which required at least a showing of probable cause for roving-patrol and fixed checkpoint searches, and *Brignoni-Ponce* which required at least a showing of reasonable suspicion based on specific articulable facts to justify roving-patrol stops. Absent some difference in the nature of the intrusion, the same minimal requirement should be imposed for checkpoint stops.

Id. at 570, 96 S.Ct. at 3088-89, 49 L.Ed.2d at 1135.

I urge the majority to consider the concerns of Justice Douglas in his concurrence in *United States v. Brignoni-Ponce*, quoted in the writer's dissent in Ewen v. State, 518 So.2d 1285 (Fla. 4th DCA 1988).

The majority en banc opinion will now represent the law of this district. Unhappily, it is contrary to my values and those of some trial judges in this district, with whose conclusions I agree. Those orders previously before this court on the issue warrant discussion because an appellate court may take judicial note *of its own records. See, e.g., Arnold Lumber Co. v. Harris*, 503 So.2d 925 (Fla. 1st DCA 1987)(court may take judicial note of helpful context of briefs in another appeal to flesh out what the opinion in that case did not reveal). *See also Foxworth v. Wainwright*, 167 So.2d 868 (Fla.1964); *Irvin v. Chapman*, 75 So.2d 591 (Fla.1954); and *Collingsworth v. Mayo*, 37 So.2d 696 (Fla. 1948).

Circuit Judge Marvin Mounts eloquently said in *Schwartzbach* that even if appellee had given his consent, it was coerced in the following situation:

> The matter was before the Court on the Defendant's Motion to Suppress December 30,

> 1986, with Charles Burton, Assistant State Attorney representing the State and Paul Petillo, Assistant Public Defender, representing the Defendant.
>
> On August 6, 1986, the Defendant was seated in a Greyhound bus parked in the West Palm Beach bus station when she was approached by two Palm Beach County Sheriff Deputies, Deputies Terry Marvin and Dale Allen. As part of their duties with the smuggling unit of the Sheriff's Office, Marvin and Allen would board northbound buses for the purpose of obtaining passenger's consent to search their carry-on baggage.
>
> Deputy Marvin testified that he initiated the conversation with Defendant and asked her if she would consent to a search of her duffel bag. Deputy Marvin testified that he obtained oral consent; a written consent to search form was not used. Defendant was not advised she had the right to refuse consent.
>
> By stipulation of counsel, part of Deputy Allen's deposition was to be heard and considered by the court on the Motion to Suppress. Deputy Allen stated in deposition that Deputy Marvin had asked Defendant if she "minded" if he searched her bag and her answer was "yes, sure." This would make the facts of this case almost indistinguishable from those in *State v. Kassidy*, 495 So.2d 907 (Fla. 3d DCA 1986)(no consent when Defendant asked "Do you mind if I search?" Defendant answered, "yeah."); and *Robinson v. State*, 388 So.2d 286 (Fla. 1st DCA 1980)("Do you mind if I pat you down?" "Sure.").
>
> Even assuming the Defendant consented to the search that consent must be voluntary and not the

product of coercion. The prospect of being a seated passenger on a commercial public transportation vehicle and seeing police officers come on board with their badges prominently displayed checking each passenger is an intimidating and coercive situation in and of itself.

I find that even if consent was given in this case it was coerced by the situation I have just described.

The Motion to Suppress is Granted.

One can see from *Schwartzbach* and from *Avery*, also decided by Judge Mounts, with whose decision I agree, that missing in both cases is the retention of the passenger's drivers' license during the detention, as had occurred in *Carroll*.

I also agree with the similar conclusions of other trial judges, the review of whose decisions has been abated, pending our decision in *Avery*.

There are answers to questions involved in the war on drugs which do not emasculate our democracy. The majority's decision here is not one of them. Most important is the fact that judicial opinions which effectively restrict constitutional rights have a way of providing authority for decisions promulgating successively greater restrictions.

The use made here by the majority of *I.N.S. v. Delgado* is a case in point. There a federal district court had denied factor workers an injunction against Immigration and Naturalization Service (INS) "factory surveys," a Court of Appeals had reversed, and the Supreme Court reversed that reversal. The essence of the holding in *Delgado* is that the actions of INS agents who, with the employer's consent, moved systematically through a factory, asking all employees their citizenship, and asking to see the papers of aliens,

while other agents were at the exits, did not constitute seizure in terms of the Fourth Amendment. A significant factual and legal aspect of *Delgado* had to be the statutory authority of the INS to question any alien or person believed to be an alien as to his right to be or remain in the United States.

Much of the *Delgado* excerpt which the majority here quotes discusses the precedential cases by use of which the *Delgado* majority showed that officers' asking persons for identification is not per se a seizure. Yet the present majority expands *Delgado* to cover random drug interrogations, conducted by local officers, of passengers riding common carriers — not factory workers at their workplace — briefly stopped in their jurisdictions, where the question is not "Who are you?" but, "May we look in your luggage for drugs?"

The immediate issue in the spate of cases of which *Avery* is representative is identification of the limits imposed on random police investigations by the Fourth Amendment and by Florida's article I, section 12. There is also, however, the broader — arguably, ineffable — subject of contemporary societal debate: how best to contain subversion, by the rampancy of illegal drugs, of our society and of the political institutions of neighboring countries.

We read of congressional plans to increase the interdictory role of the armed services, over the objection of those who fear the consequences of departing from the tradition of keeping the military out of law enforcement in civilian society. We see proposals to legalize drugs, even to put government into the drug business, in order to take away the lucrative profits that drive the illicit market. Such proposals pose at the least a moral dilemma; but they bring up also a question whose answer is not wholly known: How does the societal price of drug abuse as such compare with the price attributable solely to the fact that we have made

drugs illegal? Analogy to the history of prohibition of alcoholic beverages is imperfect for at least two reason; first, because prohibition was largely a United States phenomenon, whereas trafficking in today's drugs of choice is prohibited in much of the world; and second, because alcohol abuse and alcoholism are not nearly so disruptive of community life as are drug abuse and drug addiction.

Some believe that an intolerable health cost would attach to the legalization of drugs. *See* Kerr, *The Unspeakable is Debated: Should Drugs be Legalized?* N.Y. Times, May 15, 1988 § 1 at 1, 12 (national ed.).

The following quotation from a letter to the editor points up one danger of legalization:

> The legalization of drugs might drive their prices down but would not deglamorize the lure of drugs. Would we then bother to provide treatment for the greater number of addicts who would be legally free to buy and use drugs? In fact, do we provide adequate treatment now for alcoholics?

Sheinbaum, Make Prevention the First Priority, N.Y. Times, May 14, 1988, at 14 (national ed.).

Verne L. Speirs, Administrator of the Justice Department's Office of Juvenile Justice and Delinquency Prevention (OJJDP) tries to put a good face on the current federal effort when he writes:

> As a result of President Reagan's leadership and the Anti-Drug Abuse Act of 1986, many Federal agencies are focusing their efforts on reducing and preventing illegal drug use by juveniles.
>
> Although the Office of Juvenile Justice and Delinquency Prevention received no additional funding from the Anti-Drug Abuse Act, the Office

> took the lead in coordinating all Federal programs dealing with illegal drug use by this country's youth.

Speirs, *OJJDP Coordinates Federal Juvenile Drug Abuse Efforts,* NIJ Reports, Mar./Apr. 1988 at 10. The key words to me are those which way that his office received no additional funding from the Anti-Drug Abuse Act.

Mere publicity about the dangers of drugs will accomplish little. As Speirs himself says, despite the efforts of parents, teachers, students and national and local leaders, 5,000 Americans daily join in the ranks of cocaine users. *Id.*

Admittedly, when the writer first wrote the following lines, he was not so prescient as to recognize the range of problems to which it might be relevant:

> It would be society's greatest reward — tangibly and otherwise — were the future adult inhabitants of his state able to look back to the 1980's and reflect how their predecessors finally came to recognize the priority to be given the well being of children. Such future citizens would undoubtedly be the beneficiaries from (1) our present awareness that children are our most precious gift and entitled to enjoy the happiness which those adults responsible for them can provide: and that they are our only priceless commodity — the key to the well-being of society; and (2) our recognition that without prioritizing the physical, emotional and educational needs of children, all the efforts to eliminate crime, poverty and ignorance are only kneejerk, bandaid solutions which cure none of society's basic ills.

Costa v. Costa, 429 So.2d 1249, 1252 (Fla. 4th DCA 1983). Is this not also a guidepost on the road to solving the drug problem?

The war on drugs will not be won by plainclothes detectives asking transient bus passengers for permission to search their luggage. Our best hope is a massive prevention program, concentrating more on building young peoples' sense of self-worth than on scare tactics.

EPILOGUE

In 1982, at the urging of a conservative activist legislator, we Floridians tied our highest state court's hands, by limiting the breadth of the search and seizure provisions of our own Constitution to the Fourth Amendment constrictions of our increasingly conservative activity highest United States court.

Edwin M. Yoder, himself a southern conservative columnist, recently quoted Oliver Wendell Holmes in commenting upon the most recent intrusion by that Court into our individual lives, by way of our garbage cans:

> "We have to chose," Holmes wrote in his *Olmstead* dissent, opposing a warrantless wiretap, "and for my part I think it is a lesser evil that some criminal should escape than that the Government should play an ignoble part."
>
> The emerging test of privacy expectations is pushing us rapidly toward a Catch-22. The search of Greenwood's garbage bags would violate Fourth Amendment rights, Justice White tells us, "only if respondents manifested a subjective expectation of privacy in their garbage that society accepts as objectively reasonable."

> The trickiness of this test is obvious. Every time the Court decides that someone' expectations of privacy are without "objectively reasonable" foundation, it shrinks the zone of privacy. And every time it shrinks the zone of privacy, it obviously shrinks what society will expect.
>
> The pitfalls of this circular judicial logic were spotted from the outset—not long after the last Justice Harlan (a friend of privacy rights, it should be noted) developed the "expectations" test. If what society expects of the police and magistrates is the test, commended Prof. Anthony Amsterdam at the time, "the Government could diminish each person's subjective expectation of privacy merely by announcing half-hourly on television . . . that we were all forthwith being placed under comprehensive surveillance."
>
> Precisely.
>
> It may be of some urgency, given the state of public hysteria, to prosecute drug peddlers. But all shortcuts that expedite police work carry a cost. If garbage bags at the curb are now open to purloining and warrantless searches, what will be next? Garbage bags in the garage? It is easy to see how, as public expectations shrink, the Court could find justification for yet-greater intrusions, each feeding on the earlier one.

The Miami Herald, May 21, 1988, 23A.

ANSTEAD, Judge, dissenting.

Although I compliment the majority's effort to provide a rationale for approving "consent" searches conducted by the

police at random on interstate buses in transit, I cannot agree with the majority's legal analysis or its application to the facts of this case.[3]

STANDARD OF REVIEW

Initially I disagree simply because the majority fails to honor the fundamental rule of appellate review that reviewing courts must interpret the evidence and reasonable inferences therefrom in a manner most favorable to sustain the trial court's ruling. *McNamara v. State,* 357 So.2d 410 (Fla.1978). In contrast to the evaluation of the evidence and conclusion reached by the trial judge, the majority opinion evaluates the evidence and makes a factual finding that the alleged consent obtained by the police after boarding a bus and confronting the appellant was not coerced. In essence the majority substitutes its own view of the evidence for that of the trial judge. Hence, in the guise of criticizing the trial court's alleged adoption of a bright-line rule concerning such searches, the majority has itself adopted a bright-line rule approving, as a matter of law, all such bus searches.

ENCOUNTER OR DETENTION

I believe the majority's legal and factual analysis is flawed. In my view the most vulnerable premise of the majority opinion is the implicit conclusion that the confrontation of Avery by the police constituted a permissive encounter rather than a detention. It is well established that if a police-citizen contact is found to be a permissive encoun-

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3 As exemplified by the opinion in *Rodriguez v. State,* 494 So.2d 496 (Fla. 4th DCA 1986), and *Bostick v. State,* 510 So.wd 321 (Fla. 4th DCA 1987), this court has decided many bus search cases without providing any rationale for its decision.

ter, the police may search the traveler's luggage with his consent notwithstanding the absence of an articulable suspicion of criminality. *Florida v. Royer,* 460 U.S. 491, 103 S.Ct. 1319, 75 L.Ed.2d 229 (19830; *United States v. Mendenhall,* 446 U.S. 544, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980); *Terry v. Ohio,* 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). However, the detention of a citizen violates his right to be free from unreasonable seizure "absent some reasonable suspicion of misconduct." *Brown v. Texas,* 443 U.S. 47, 99 S.Ct. 2637, 61 L.Ed.2d 357 (1979). To sustain a consent search conducted during a detention, unsupported by reasonable suspicion of misconduct, the state must produce clear and convincing evidence of a voluntary consent to search free of the taint of the improper detention. *Alvarez v. State,* 515 So.2d 286 (Fla. 4th DCA 1987).

The majority essentially rules as a matter of law that being a seated passenger subjected to particularized inquiry or to a sweep by police of all passengers on a bus cannot be sufficiently intimidating as to possibly vitiate a passenger's consent to have his bags searched. The majority holds:

> The defendant was not stopped, restrained or otherwise detained. There were no weapons involved,[4] and no inappropriate nor intimidating conduct or language was used. The defendant was not asked to move, now was he physically prevented from moving.

[Majority opinion, p. 187]. In response to these conclusions, I tend to agree with the comments of Judge Letts made in his dissent in *Bostick v. State,* 510 So.2d 321, 323 (Fla. 4th DCA 1987):

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4 It should be noted that the officer testified not that there were no weapons involved, but rather that they had "no guns exposed."

Moreover, my version of common sense tells me that a paid and ticketed passenger will not voluntarily forfeit his destination and get up and exit a bus in the middle of his journey, during a temporary stopover while a policeman, one with a pouched gun in his hand, are standing over him in a narrow aisle asking him questions and requesting permission to search his luggage. It is not a question of whether he actually was free to leave, as all of us trained lawyers know he was. The test is whether a layman would reasonably be expected to believe he was free to leave under these circumstances. I conclude he would not.

My having decided that the defendant was not free to leave, it follows that the police questioning under the facts of this case constituted an illegal detention and a seizure. In the words of the *Royer* court, since the defendant "was being illegally detained when he consented to the search of his luggage, we agree that the consent was tainted by the illegality and was ineffective to justify the search." *Id.* 103 S.Ct. at 1329.

Nor do I find that the State has sustained its burden of establishing that any such taint was rendered harmless by a subsequent unequivocal break in the chain connecting the original seizure with the ensuing consent to search. On the contrary, the consent to search was given immediately upon the heels of the illegal detention and no measurable break in the chain took place. *See Elsleger v. State*, 503 So.2d 1367 (Fla. 4th DCA 1987), and *Brown v. Illinois*, 422 U.S. 590, 95 S.Ct. 2254, 45 L.Ed.2d 416 (1975).

Id. at 323-34. Judge Letts' views are consistent with the result and the privacy analysis we have previously utilized in evaluating a similar search on a train. *See Alvarez v. State*, 515 So.2d 286 (Fla. 4th DCA 1987),. *See Hunter v. State*, 518 So.2d 304 (Fla. 4th DCA 1987)(trial court's denial of motion to suppress approved where there is clear and convincing proof of voluntary consent to search). I would apply the same analysis here.

THE FACTS

Although the majority concedes in a footnote that there is a factual difference between consent given before and after boarding which the trial court may consider in weighing the totality of the circumstances, its conclusion that the contact sub judice was an "encounter" ignores completely the particular circumstances presented by bus searches which would support a finding of detention rather than an encounter. These factors include:

> 1) the contrast between access to an obviously public bus terminal and the interior of an interstate bus in transit where access to the latter is restricted to passengers with tickets or others having a good reason to be on board with the authorization of the bus company;
>
> 2) the novelty of a police search of a bus in this country and the unfamiliarity of many passengers with their right to refuse consent for a search by the police without having to fear arrest or other repercussions as a consequence of that refusal;
>
> 3) the tremendous authority placed in the hands of police officers to compel obedience to their requests and the peaceful deference to that authority urged upon our citizens. When uttered by a

person in authority, a "may" often becomes a "must";

4) the implicit accusatory nature of a request by the police to search a particular passenger's luggage for illegal drugs;

5) the small area to which a seated passenger is confined and the resulting conspicuousness attendant to a passenger's attempt to publicly decline to give consent, to refuse further conversation with police or to leave a bus already filled with passengers;

6) the narrow aisles which are automatically "blocked" merely by the presence of a police officer even though the officer may not "intend" that his presence in the aisle should serve to "detain" the passengers whose bags he seeks to search;

7) the brief duration for which the bus is stopped before departure;[5]

8) the police officers' presence on board right up until the time that the bus is ready to depart, thereby making the passenger less likely to view exit and re-entry onto the bus to be a reasonable alternative.

In my view, these factors support the trial court's findings and render questionable a conclusion that a reasonable

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5 The police officers testified that they only had ten minutes to check the bus during the boarding operation.

passenger in transit would in fact have felt free to leave or to terminate the contact as would someone in the terminal.[6]

THE LAW

As noted above, the primary flaw in the legal analysis of the majority opinion is that it completely fails to address the issue of whether a reasonable person would feel free to leave under the prevailing circumstances, in spite of the fact that language is utilized as the standard in all of the recent Supreme Court cases. *I.N.S. v. Delgado,* 466 U.S. 210, 104 S.Ct. 1758, 80 L.Ed.2d 247 (1984); *Florida v. Royer,* 460 U.S. 491, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983); *United States v. Mendenhall,* 446 U.S. 544, 100 S.Ct. 1870, 64 L.Ed.2d 497, *reh'g denied,* 448 U.S. 908, 100 S.Ct. 3051, 65 L.Ed.2d 1138 (1980). The majority makes several broad and conclusory statements unsupported by analysis. On page 184, is the bald statement that Avery "had not been 'stopped' or 'seized' as those terms are commonly understood." Again on page 187: "The defendant was not stopped, restrained nor otherwise detained." Yet *Terry v. Ohio,* 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), is quoted on page 9 for the principle that a seizure has occurred when the police officer, "by means of physical force *or show of authority*" has restrained the liberty of a citizen.

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6 Without a determination that the subject search was consensual pursuant to an encounter, the trial court would have to consider whether the search was permissible as one pursuant to a "detention" based on an articulable suspicion. Noteworthy on this issue is the lack of any challenge to the trial court's express statement to the effect that the facts presented here did not support a finding of "articulable suspicion." That conclusion too found support by substantial competent testimony by the police officer that all bus passengers must stow carryon bags under their seats and that is not at all unusual that a passenger would accomplish that by shoving his bags under the seat with his feet and would then rest his feet on the bag for lack of other floor space.

The majority simply ignores the issue raised by Judge Letts as to whether the conduct of two officers exhibiting the trappings of authority, standing in the narrow aisle of the bus, towering over a seated passenger, and asking for a ticket, identification and permission to search his luggage, is the "show of authority," referred to in *Terry*, or whether the average citizen would feel free to leave. Even *Mendenhall*, in which the detention was found not to be illegal, stated that the presence of more than one officer, display of weapons, and wearing of uniforms, may be circumstances which would indicate the passenger may think he was not free to leave. 446 U.S. at 554, 100 S.Ct. at 1877. Similarly, the Supreme Court in *Schneckloth v. Bustamonte*, 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973), states that consent can be coerced by explicit or *implicit* means, and quotes Justice Traynor in holding that whether consent is given in response to *"implied assertion of authority"* is a question of fact. 93 S.Ct. at 2044. By failing to address this issue, the majority ignores the factual circumstances of the confrontation and the trial court's resolution of the facts.[7]

The majority repeatedly cites *I.N.S. v. Delgado* and appears to rely heavily on that case. Such reliance seems to be misplaced for several reasons. In *Delgado*, the INS conducted "factory sweeps" for the purpose of looking for illegal aliens. In two "surveys," the INS acted pursuant to *warrants* issued upon a showing of probable cause that numerous illegal aliens were employed at a particular factory owned by a certain garment company. The third survey was done at another factory of the same company, with the employer's

7 Another issue ignored by the majority is the extent of the consent, if any, given to search Avery's luggage. It appears factually that any consent sought and obtained was to "look through" the luggage, not to forcibly tear open a sealed and wrapped container. *See Horvitz v. State*, 433 So.2d 545 (Fla. 4th DCA 1983); *State v. Cross*, 13 F.L.W. 270 (Fla. 3d DCA Jan. 26, 1988).

consent. The INS agents were armed, displayed badges, and had walkie-talkies. Some agents were stationed at the exits. *Delgado* was decided by a five-member court. The majority held that there was no seizure of the entire work force during the duration of the surveys, nor was the individual questioning of respondents a seizure. Justices Brennan and Marshall concurred only in the former, not the latter part of the holding. 104 S.Ct. at 1767. Thus there were only three justices concurring in the majority holding that the *individual questioning was not a seizure.* Notably, the dissenters were of the opinion that the surveys demonstrated a "show of authority" and that a reasonable person would "feel compelled" to provide answers to the agents' questions. *Id.* at 1769. That part of the holding with which *five* justices agreed — that there was no seizure of the entire work force for the duration of the surveys — would only be helpful in the instant case if the trial court had found that *all* the passengers on the *entire* bus had been seized for the duration of the officers' questioning.

Furthermore, two of the surveys involved in *Delgado* were conducted pursuant to warrants issued on probable cause, and the third was conducted at another factory operated by the same company. In other words, the surveys were conducted with judicial authorization based on reasonable belief that illegal aliens were employed at those *particular* factories. Although it may be unwise to hang one's hat onto his distinction (as the warrants did not identify any particular illegal aliens by name and the surveys affected all workers, including the legal ones), at least the INS agents — unlike the officers in the case at bar — were not merely guessing that they would uncover illegal activity. The officers in *Avery* even lacked knowledge that any particular bus would be transporting an individual(s) engaged in illegal activity. If that were the case, *Delgado* would be more closely analogous to this case.

The majority's injection into its opinion of one of the United States Supreme Court cases involving Border Patrol/motor vehicle stops, and then addressing it only cursorily, is also disconcerting. *United States v. Martinez-Fuerte,* 428 U.S. 543, 96 S.Ct. 3074, 49 L.Ed.2d 1116 (1976), and *State v. Jones,* 483 So.2d 433 (Fla.1986) are cited on page 10, preceded by the statement that "random stopping of motor vehicles at roadblocks without cause" passes constitutional muster. A careful reading of *Martinez-Fuerte* does not lead to the same broad conclusions as that reached by the majority. *Martinez-Fuerte* involves *permanent* roadblocks at a border patrol checkpoint near the Mexican border. Since all cars are stopped at the checkpoints, the stops are not "random." The purpose of such checkpoints is to visually inspect for possible illegal aliens coming over the border. The Court approved such stops, even without articulable suspicion as to any particular case, because they are permanent and fixed and *known* to motorists *in advance,* and the concern or fright to travelers is minimal because other vehicles are also being stopped. Significantly, in another Border Patrol/motor vehicle stop case, the Court held that *roving* patrols may only stop vehicles if there are "specific articulable facts . . . that reasonably warrant suspicion" that the *particular* vehicle contains illegal aliens. *United States v. Brignoni-Ponce,* 422 U.S. 873, 884, 95 S.Ct. 2574, 2582, 45 L.Ed.2d 607 (1975). The Court notes that legitimate motorists may be frightened if stopped at random by a roving patrol, and that such limited discretion in the police may be abused and cannot be allowed. *Id; Martinez-Fuerte.* Thus, the Supreme Court has differentiated between fixed, permanent stops known in advance which do not catch any motorist by surprise and which do not require articulable suspicion, versus random stops by roving patrols which do surprise and may frighten motorists and *do* require articulable suspicion. The situation in the case at bar seems obviously more analogous to the latter case, and

would therefore seem to require articulable suspicion. Furthermore, the Florida Supreme Court held in *State v. Jones,* that law enforcement officials must issue written uniform guidelines which *minimize the discretion* of field officers before conducting DUI roadblocks; that there must be *sufficient warning* in advance of the stop; and that vehicles could not be stopped "selectively," 483 So.2d at 438, such as by roving patrols. Thus the majority's reference to *Martinez-Fuerte* and *State v. Jones* seems inappropriate, since both cases — in different but similar situations — speak to the need for warning, and the need to prevent unbridled discretion on the part of law enforcement officers.

Judge Letts' "common sense" reaction to the circumstances presented here is similar to that of numerous trial judges in this district who have made similar observations while both granting and denying motions to suppress in bus search cases. For instance, in the order challenged in *McPherson v. State,* No 87-2226 (Fla. 4th DCA), Judge Carl Harper, although denying a motion to suppress on the authority of *Rodriguez v. State,* 494 So.2d 496 (Fla. 4th DCA 1986), expressed serious concerns about the police conduct in his order:

> In so ruling, I have some strong personal reservations about the drug interdiction program described herein, in spite of the fact that drug smuggling is a major problem in our society today. The procedure is inherently intrusive on a person's right of privacy. It invites abuse and tends to diminish fourth amendment protections. For example, how many times must a person be confronted with this procedure while he is traveling from Miami to New York City? And, where will it all end, i.e., can it be used on board airlines during a layover? Can police officers go through a neighborhood, knocking on doors and asking for consent

to search houses and contents in their war against drugs?

It is in cases like this that we must confront the question of whether our system of government is really that different from systems prevailing in other countries where the routine boarding of public transportation and confrontation of passengers by police officers is accepted without questioning. In my view our system is different, and better, because we indeed value our right of privacy, our right to be let alone, and we are willing to pay a heavy price to protect that right, including the abuse of that right by those who disseminate the poison of illegal drugs among us. Ultimately, perhaps, one of the greatest harms inflicted on our society by those persons will be the loss of personal freedom forfeited voluntarily by many in desperation and frustration at our inability to otherwise solve the "drug problem" within our own society.

Miguel MENDEZ, Appellant,

v.

STATE of Florida, Appellee.

No. 4-86-1210.

District Court of Appeal of Florida,
Fourth District,

Nov. 16, 1988.

PER CURIAM.

Affirmed on authority of *State v. Avery*, 531 So.2d 182 (Fla. 4th DCA 1988)(en banc).

DOWNEY, DELL and STONE, JJ., concur.

Michael MCBRIDE, Appellant,

v.

STATE of Florida, Appellee.

District Court of Appeal of Florida
Fourth District

Dec. 28, 1988.

PER CURIAM.

We affirm on the authority of *Avery v. State*, 531 So.2d 182 (Fla. 4th DCA 1988).

HERSEY, C.J., and LETTS and GLICKSTEIN, JJ., concur.

Joseph SERPA, Appellant,

v.

STATE of Florida, Appellee.

No. 88-2454.

District Court of Appeal of Florida,
Fourth District

April 26, 1989.

PER CURIAM.

AFFIRMED.

We certify to the supreme court the same question as certified in *State v. Avery*, 531 So.2d 182 (Fla. 4th DCA 1988), as a question of great public importance:

> MAY EVIDENCE OBTAINED AS A RESULT OF DEFENDANT'S CONSENT TO SEARCH, BE SUPPRESSED BY THE TRIAL COURT AS "COERCED" UPON THE SOLE GROUND THAT THE OFFICER(S) BOARDED A BUS (OR OTHER PUBLIC TRANSPORT) AND RANDOMLY SOUGHT CONSENT FROM PASSENGERS?

DELL, WALDEN and POLEN, JJ., concur.

Tyrone E. SHAW, Appellant,

v.

STATE of Florida, Appellee.

District Court of Appeal of Florida,
Fourth District.

No. 88-3019.

May 31, 1989.

PER CURIAM.

We affirm the appellant's conviction and sentence on the authority of *State v. Avery,* 531 So.2d 182 (Fla. 4th DCA 1988), and certify to the supreme court the same question of great public importance which we certified in *State v. Avery.*

AFFIRMED.

ANSTEAD, GUNTHER, and WARNER, JJ., Concur.

APPENDIX C

Michael MCBRIDE, Petitioner,

vs.

STATE of Florida, Respondent.

Supreme Court of Florida

Case No. 73,514

November 30, 1989.

(BARKETT, J.) We have for review *McBride v. State* 535 So.2d 692 (Fla. 4th DCA 1988), in which the district court affirmed on authority of *State v. Avery,* 531 So.2d 182 (Fla. 4th DCA 1988). In *Avery,* the district court certified the following question to be of great public importance:

> May evidence, obtained as a result of a defendant's consent to search, be suppressed by the trial court as "coerced" upon the sole ground that the officer(s) boarded a bus (or other public transport) and randomly sought consent from passengers?

Id. at 188. We have discretionary jurisdiction. Art. V., § 3(b)(4), Fla. Const. For the reasons expressed in *Bostick v. State,* 554 So.2d 1153 (Fla. 1989), we answer the certified question, as rephrased therein, in the affirmative, quash the opinion of the district court and remand to the district court for proceedings consistent with *Bostick.*

It is so ordered. (ERHLICH, C.J., and SHAW and KOGAN, JJ., Concur. GRIMES, J., Dissents with an opinion in which OVERTON and McDONALD, JJ., Concur.)

(GRIMES, J., dissenting) I dissent for the reasons expressed in my dissenting opinion in *Bostick v. State*, 554 So.2d 1153 (Fla. 1989). OVERTON and McDONALD, JJ., Concur.

Miguel MENDEZ, Petitioner,

v.

STATE of Florida, Respondent.

Supreme Court of Florida

Case No. 73,447.

November 39, 1989.

(BARKETT, J.) We have for review *Mendez v. State*, 534 So.2d 774 (Fla. 4th DCA 1988), in which the district court affirmed on authority of *State v. Avery*, 531 So.2d 182 (Fla. 4th DCA 1988). In *Avery*, the district court certified the following question to be of great public importance:

> May evidence obtained as a result of defendant's consent to search, be suppressed by the trial court as "coerced" upon the sole ground that the officer(s) boarded a bus (or other public transport) and randomly sought consent from passengers?

We have discretionary review. Art. V, § 3(b)(4), Fla. Const. For the reasons expressed in *Bostick v. State*, 554 So.2d 1153 (Fla. 1989), we answer the certified question, as rephrased therein, in the affirmative, quash the opinion of the district court, and remand to the district court for further proceedings consistent with *Bostick*.

It is so ordered. (EHRLICH, C.J., and SHAW and KOGAN, JJ., Concur. GRIMES, J., Dissents with an opinion, in which OVERTON and McDONALD, JJ., Concur.)

(GRIMES, J., dissenting.) I dissent for the reasons expressed in my dissenting opinion in *Bostick v. State*, 554 So.2d 1153 (Fla. 1989). (OVERTON and McDONALD, JJ., Concur.)

Adrian AVERY, Petitioner,

v.

STATE of Florida, Respondent.

Supreme Court of Florida

Case No. 73,289

November 30, 1989.

(BARKETT, J.) We have for review *State v. Avery*, 531 So.2d 182, 188 (Fla. 4th DCA 1988), in which the district court certified the following question to be of great public importance:

> May evidence, obtained as a result of defendant's consent to search, be suppressed by the trial court as "coerced" upon the sole ground that the officer(s) boarded a bus (or other public transport) and randomly sought consent from passengers?

We have discretionary jurisdiction. Art. V., § 3(b)(4), Fla. Const. For the reasons expressed in *Bostick v. State*, 554 So.2d 1153 (Fla. 1989), we answer the certified question, as rephrased therein, in the affirmative, quash the opinion of the district court, and remand to the district court for proceedings consistent with Bostick.

It is so ordered. (ERHLICH, C.J., and SHAW and KOGAN, JJ., Concur. GRIMES, J., Dissents with an opinion in which OVERTON and McDONALD, JJ., Concur.)

(GRIMES, J., dissenting) I dissent for the reasons expressed in my dissenting opinion in *Bostick v. State,* 554 So.2d 1153 (Fla. 1989). OVERTON and McDONALD, JJ., Concur.

Joseph SERPA, Petitioner,

vs.

STATE of Florida, Respondent.

Supreme Court of Florida

Case No. 74,145

November 30, 1989.

(BARKETT, J.) We have for review *State v. Avery,* 531 So.2d 182, 188 (Fla. 4th DCA 1989), in which the district court certified the following question to be of great public importance:

> May evidence, obtained as a result of defendant's consent to search, be suppressed by the trial court as "coerced" upon the sole ground that the officer(s) boarded a bus (or other public transport) and randomly sought consent from passengers?

We have discretionary jurisdiction. Art. V., § 3(b)(4), Fla. Const. For the reasons expressed in *Bostick v. State,* 554 So.2d 1153 (Fla. 1989), we answer the certified question, as rephrased therein, in the affirmative, quash the opinion of the district court, and remand to the district court for proceedings consistent with *Bostick.*

It is so ordered. (ERHLICH, C.J., and SHAW and KOGAN, JJ., Concur. GRIMES, J., Dissents with an opinion in which OVERTON and McDONALD, JJ., Concur.)

(GRIMES, J., dissenting) I dissent for the reasons expressed in my dissenting opinion in *Bostick v. State*, 554 So.2d 1153 (Fla. 1989). OVERTON and McDONALD, JJ., Concur.

Tyrone E. SHAW, Petitioner,

vs.

STATE of Florida, Respondent.

Supreme Court of Florida

Case No. 74,398

November 30, 1989.

(BARKETT, J.) We have for review *Shaw v. State*, 543 So.2d 469 (Fla. 4th DCA 1989), in which the district court affirmed Shaw's conviction and sentence on the authority of *State v. Avery*, 531 So.2d 182 (Fla. 4th DCA 1988), and certified the same question as it certified in *Avery*. We have discretionary jurisdiction. Art. V., § 3(b)(4), Fla. Const. For the reasons expressed in *Bostick v. State*, 554 So.2d 1153 (Fla. 1989), we answer the certified question, as rephrased therein, in the affirmative, quash the opinion of the district court, and remand to the district court for proceedings consistent with *Bostick*.

It is so ordered. (EHRLICH, C.J., and SHAW and KOGAN, JJ., Concur. OVERTON, McDONALD and GRIMES, JJ., Dissent.)

89-1717

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1989

STATE OF FLORIDA,

Petitioner,

v.

TERRANCE BOSTICK,

Respondent.

BRIEF IN OPPOSITION TO PETITION
FOR WRIT OF CERTIORARI

LAW OFFICES OF MAX P. ENGEL
Attorneys for the Respondent
1461 N.W. 17th Avenue
Miami, Florida 33125
305/325-1810

QUESTION PRESENTED FOR REVIEW

As stated by the Supreme Court of Florida the question is as follows:

> "Does an impermissible seizure result when police mount a drug search on buses during scheduled stops and question boarded passengers without articulable reasons for doing so, thereby obtaining consent to search the passenger's luggage?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CONSTITUTIONAL PROVISIONS INVOLVED

Search and Seizures

The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, and against the unreasonable interception of private communications by any means, shall not be violated. No warrant shall be issued except upon probable cause, supported by affidavit, particulary describing the place or places to be searched, the person or persons, thing or things to be seized, the communication to be intercepted, and the nature of evidence to be obtained. This right shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court. Articles or information obtained in violation of this right shall not be admissible in evidence if such articles or information would be inadmissible under decisions of the United States Supreme Court construing the 4th Amendment to the United States Constitution. Article I Section 12, Florida Constitution - 1968 Revision.

Right of Privacy

Every natural person has the right to be let alone and free from governmental intrusion into his private life except as otherwise provided herein. This section shall not be

construed to limit the public's right of access to public records and meetings as provided by law. Article I Section 23, Florida Constitution.

Searches and Seizures

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment IV, United States Constitution.

STATEMENT OF THE CASE

The Respondent, TERRANCE BOSTICK, was a passenger on a bus which was travelling from Miami to Atlanta. Respondent was lying across the back bench sleeping when the bus made a scheduled stop in Fort Lauderdale, Florida.

Two Broward County Sheriff's officers boarded the bus. They carried badges, wore jackets identifying themselves as Sheriff's officers and one carried a pouch which recognizably contained a pistol. They went to where Respondent was lying, stood over him and at least partially blocked the aisle.

Respondent was asked to produce his ticket and identification which were checked and returned to him. The officers explained that they were involved in drug interdiction and requested permission to search Respondent's luggage. Permission was allegedly given to search two bags, one of which did not belong to Respondent.

A search of the bags revealed illegal drugs and Respondent was arrested and charged with trafficking in cocaine.

In the trial Court a motion to suppress the illegal drugs was filed. The trial Court heard testimony and argument and entered its order denying the motion. Respondent entered a plea and reserved his right to appeal the denial of the motion to suppress.

The Fourth District Court of Appeal affirmed the trial Court and certified the issue to the Florida Supreme Court

as being of great public importance, Bostick v. State, 510 So. 2d 321 (Fla. 4th DCA 1987). The Florida Supreme Court quashed the opinion of the Fourth District Court of Appeal and ordered the case remanded for further proceedings consistent with its opinion which found the procedure to be illegal, Bostick v. State, 554 So. 2d 1153 (Fla. 1989).

As noted by the State of Florida in its Petition for Writ of Certiorari this case was not an isolated incident but was one case which came about from a policy of boarding buses and trains of the Broward County Sheriff's Office. This case was chosen as the lead case of six cases presenting a similar issue. There were also numerous other cases on this issue decided by the Fourth District Court of Appeal which were not before the Florida Supreme Court.

SUMMARY OF ARGUMENT

The Florida Supreme Court did not pass upon a question of federal law. It merely passed upon a question of purely state law which, due to the Florida Constitution, is in some instances, equivalent to federal law. The Florida Supreme Court is only bound by decisions of this Court and as there are none on this particular issue it is a state law issue.

Further, the decision invokes the Florida Constitution's right to privacy clause. This is also purely a state matter which this Court has no jurisdiction over.

Both of the grounds are independent and adequate state grounds to support the judgment of the Florida Supreme Court.

ARGUMENT

The State of Florida has requested that this Court accept certiorari in this matter as one which decides an issue of federal law. Respondent cannot agree with that view.

While it is true that the Florida Constitution states that its provision of searches and seizures is to be construed in conformity with the 4th Amendment to the United States Constitution it is only as that provision is interpreted by this Court.

The State of Florida, in its petition, points out conflict with another state court, i.e. State v. Christie, 385 S.E. 2nd 181 (N.C. 1989) and a federal appellate court, i.e. United States v. Blake, 888 F. 2d 795 (11th Cir. 1989). The State does not point to any decision of this Court which permits the procedure followed by the Broward County Sheriff's Office. Until such time as this Court does pass upon this specitic issue the Florida Supreme Court should be free to interpret the Florida Constitution in accordance with applicable Florida law and decision of this Court.

It should be noted that in its decision on this matter the Florida Supreme Court, with one exception, cited only to Florida cases or decisions of this Court. That is keeping within the dictate of the Florida Constitution. As such this Court should refuse to exercise jurisdiction as the decision

rests on an independent and adequate state ground, see Delaware v. Prouse, 440 U.S. 648, 99 S. Ct. 1391, 59 L. Ed. 2d 660 (1979) and Fox Film Corporation v. Muller, 296 U.S. 207, 56 S. Ct. 183, So. L. Ed. 158 (1935).

Under the Florida Constitution the Florida Supreme Court must consider decisions of this court when deciding search and seizure issues. This does not make the issue one of federal law it merely makes Florida law equivalent to federal law when it is set forth by this Court. Therefore, in this matter the Florida Supreme Court was merely making a ruling on state law and, as has been noted by this Court, "... we have no authority to review state determinations of purely state law." International Longshoreman's Association, AFL-CIO v. Davis, 476 U.S. 360, 106 S. Ct. 1904, 90 L. Ed. 2d 389 (1986).

There is one other matter which this Court should consider and that is the Florida Constitutions guarantee of a right to privacy. While not explicitly cited to by the Florida Supreme Court is was a factor considered in reaching its decision. The Florida Supreme Court state, "(t)he instrusion upon privacy rights caused by the Broward County Policy is too great for a democracy to sustain." Bostick v. State, 554 So. 2d 1153, 1158 (Fla. 1989).

As was stated in Payton v. New York, 445 U.S. 573, 100 S. Ct. 1371, 63 L. Ed. 2d 639 (1980), "... by invoking a state

constitutional provision, a state court immunizes its decision from review by this Court." The above quoted passage is a clear invocation of Florida's constitutional provision guaranteeing its citizens right to privacy. As such it is another independent and adequate ground and this Court should not take jurisdiction over this matter.

CONCLUSION

As there exist independent and adequate state grounds to support the judgment of the Florida Supreme Court this Court should deny the petition for writ of certiorari.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing was mailed to the Joan Fowler, Assistant Attorney General, Department of Legal Affairs, 111 Georgia Avenue, Room 204, West Palm Beach, Florida 33401, this 10th day of July, 1990.

LAW OFFICES OF MAX P. ENGEL
Attorneys for the Respondent
1461 N.W. 17th Avenue
Miami, Florida 33125
305/325-1810

BY Kenneth P. Speiller
KENNETH P. SPEILLER

Case No. 89-1717

IN THE

Supreme Court of the United States

October Term, 1990

STATE OF FLORIDA,

Petitioner,

vs.

TERRANCE BOSTICK,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED APRIL 26, 1990
CERTIORARI GRANTED OCTOBER 9, 1990

TABLE OF CONTENTS

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

Sept. 1, 1985	Information
Dec. 20, 1985	Defendant's Motion to Suppress
Dec. 20, 1985	Defendant's Statement of Facts and Memorandum of Law
March 24, 1986	Hearing on Motion to Suppress Deposition filed of Bryan K. Williams (taken 3-19-86)
June 11, 1986[1]	Deposition filed of George Black (taken 6-6-86)
June 18, 1986	Supplemental Memorandum in Support of Defendant's Motion to Suppress
August 4, 1986	Order Denying Motion to Suppress
Sept. 9, 1986	Hearing on Change of Plea
Oct. 8, 1986	Notice of Appeal
Nov. 1, 1986	Amended Order of Probation (nunc pro tunc 10/8/86)
April 8, 1987	Fourth District Court of Appeal Opinion (Per Curiam Affirmance)
July 22, 1987	Fourth District Court of Appeal Opinion on Rehearing
Nov. 30, 1989	Supreme Court of Florida's Opinion

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1 Although not listed in the circuit court docket sheet, this is included in the circuit court case file, with a handwritten notation on cover page indicating "filed in open court 6/11/86."

IN THE

Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida

Case No.: 85-10543 CF

JUDGE SEAY
STATE OF FLORIDA,

Plaintiff,

vs.

TERRANCE BOSTICK,

Defendant.

ORDER

THIS CAUSE having come on to be heard on Defendant's/~~Plaintiff's~~ Motion TO SUPPRESS and the Court having heard argument of counsel, and being otherwise advised in the Premises, it is hereupon,

ORDERED AND ADJUDGED that said Motion be, and the same is hereby DENIED.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida, this 4th day of August, 1986

_____/s/_____
Circuit Judge

Copies furnished:
State Attorney
Max Engel, Attorney for Defendant

IN THE

Circuit Court of the Seventeenth Judicial Circuit in and for Broward County, Florida Criminal Division

CASE NO. 85-10543 CF

STATE OF FLORIDA,

Plaintiff,

vs. Fla. Bar No. 109795

TERRANCE BOSTICK,

Defendant.

MOTION TO SUPPRESS

COMES NOW the Defendant, TERRANCE BOSTICK, by and through his undersigned attorney and files this Motion to Suppress and as grounds therefor states:

1. That the search of Defendant seated as a passenger inside of a Greyhound bus lacked probable cause.

2. That no permission and/or authorization was given the police officers by Defendant to conduct a search of Defendant's belongings.

3. That if the police officers proceeded to search Defendant with what they deemed was permission said permission was the result of coercion and the intimidating circumstances surrounding the bus boarding.

4. That the Broward County Sheriff Department has no written authority to enter said buses arbitrarily without specific purposes or knowledge of any criminal act taking place, and that in this case the police officers admit no specific authorization was received from the bus driver of Defendant's bus, nor was there any reason [sic] suspicion and/or probable cause to believe Defendant nor any other passenger was committing a crime on that particular bus on that particular morning prior to the police boarding.

WHEREFOR we pray this Honorable Court enter an Order Suppressing the evidence obtained due the illegal search and seizure.

I HEREBY CERTIFY that a true and correct copy of the above and foregoing was mailed to the State Attorney's Office 201 S.E. 6th Street, Ft. Lauderdale, Fl., this 17th day of December, 1985.

LAW OFFICES OF MAX P. ENGEL
Attorney for the Defendant
1461 N.W. 17th Avenue
Miami, Florida 33125
305/325-1810

BY:_____/s/_____

LOUIS B. STOSKOPF
STATE OF FLORIDA)
COUNTY OF BROWARD)

Russell E. Seay, Jr., J.

IN THE
Circuit Court of the 17th Judicial Circuit

STATE OF FLORIDA,

Plaintiff,

vs. No. 85-10543

TERRANCE BOSTICK,

Defendant.

Proceedings had and taken before the Honorable Russell E. Seay, Jr., one of the Judges of said Court, at the Broward County Courthouse, commencing at or about 2:30 o'clock P.M., March 24, 1986, in the City of Fort Lauderdale, County of Broward, State of Florida, and being a Motion to Suppress.

APPEARANCES:

JAMES DEHART, ESQUIRE
Assistant State Attorney
appearing on behalf of the State of Florida.

LOUIS STOSKOPF, ESQUIRE
appearing on behalf of the Defendant.

* * * *

MR. STOSKOPF: I subpoenaed — you might recall, this has been up for a hearing before and we had a continuance to subpoena one of the witnesses. In fact, there were two witnesses. A witness I knew the name and a John Doe who were on the bus on this particular morning and were young kids. I think one testified he was 17 up at the

Job Corp school in Kentucky. One returned, I think — well, this Friday would be two weeks. We took his deposition last Wednesday. The basis of the deposition was that he would be out of the State, back into Kentucky. He was supposed to be down one week and return.

At his deposition last Wednesday, which Mr. Dehart attended and the deposition has been filed of record, he indicated that his leave was extended and he would be here until this week. Upon hearing that, I issued a subpoena on Friday. It was served, according to the process server, as of noon today. In fact, the young fellow called me Saturday morning in the office and said he had just been served a subpoena. He understood his deposition would suffice for this hearing and I said, well, since you indicated you would be in town, I didn't know if you would accept this deposition or not in lieu of the fact he was living in Kentucky now and he indicated he might have trouble getting there. I said, if you do, call me at 1:00 o'clock and I would make some arrangements to be up there. He lives on 45th Avenue, I believe, North Miami.

The other, John Doe, turned out to be Eric Green, who was on the bus on that particular morning and as [sic] a friend of Williams up in Kentucky. They did not know each other before this incident. They rode together on the bus.

Eric Green, according to Mr. Williams, was due to arrive last Friday. He lives up here in Fort Lauderdale. I called the Job Corp Friday and they told me about your previous order about releasing the information as to Williams and they said, well, they would give me the information. They called back Friday afternoon and gave me Mr. Green's address up here in Fort Lauderdale. The process server, as of noon today, informed my secretary that he did serve the subpoena on Mr. Green through his, I believe, a sister; someone over 18 in that house and he was supposedly in

town. Whether or not he's actually arrived here from Kentucky or not, Judge, I can't say for sure, although the person in the house indicated to the process server that he was in town. As of 2:30, neither boys, neither one of the two boys are here but they have been served with a subpoena. I have the deposition of Mr. Williams. So this case is going to stem on the issue of fact on consent of search on the bus.

I would ask Your Honor, under the circumstances, to consider the deposition of Mr. Williams in this evidentiary hearing and if Your Honor would consider to take the testimony today of the police officers. Both police officers are here and the defendant is here and, then, hold your decision until such time as, hopefully, I can get a deposition from Green or bring him into (sic) testify. But if Mr. Dehart is present, we'll take his deposition up here in Broward County. He's from Fort Lauderdale. He's also 17 years old.

I don't know if they know the impact of being served with a subpoena or not but neither one are here.

THE COURT: But you do have the deposition of one of them?

MR. DEHART: Yes, sir.

MR. STOSKOPF: On Williams, yes. Mr. Dehart has been served with a copy. Well, I gave him a copy. It was given to me this morning from the court reporter and the original in is (sic) the court file. Mr. Dehart has gone over it with the officer.

THE COURT: He couldn't add much more if he were here, would he?

MR. STOSKOPF: No. I have no objection. In fact, under the circumstances, I would ask that you take the deposition into consideration on behalf of the defendant.

THE COURT: All right.

MR. STOSKOPF: He's our witness.

THE COURT: All right. We'll see what happens with the other one. If he doesn't show today, though, you would have to follow up with that.

MR. STOSKOPF: Well, he's supposed to be here a week on leave. They confirmed that through the Job Corp. I assume he's in Fort Lauderdale. He's been served with a subpoena, although not individually, through someone over 18 at his house that he resides in. Apparently, it's his family's house here in Fort Lauderdale, although he's been living in Kentucky since August. And I understand from Williams that their schooling is, like, a two-year tour of school up there. So they can be classified as a Kentuckian resident although they're not 18.

THE COURT: Yes. Well, you would have to get a rule to show cause if you wanted to pursue it.

MR. STOSKOPF: Well, would you reserve that to the end of the hearing to see if you deem his testimony pertinent?

THE COURT: Sure.

* * * *

(Thereupon OFFICER JOSEPH NUTT was called as a witness on behalf of the Plaintiff and, having been duly sworn, was examined and testified as follows:)

* * * *

DIRECT EXAMINATION BY MR. DEHART:

Q Mr. Nutt, state your age, please for the record?

A Twenty-six.

Q On August 27th of 1985, did you come in contact with Terrance Bostick?

A Yes. I arrested Terrance Bostick, seated right there in the blue suit (indicating).

Q At the Greyhound Bus Station, Fort Lauderdale, Broward County, State of Florida?

A Yes.

Q At that time, how were you dressed?

A Plainclothes and I was wearing a green windbreaker with Broward County Sheriff's Office written on it and, also, with patches on it.

Q Did you have a gun?

A Yes.

Q Was the gun concealed or was it exposed?

A Concealed.

Q Was anybody else with you when you made contact with Terrance Bostick?

A My partner, Steven Rubino.

Q When you made contact with Mr. Bostick, was he on the Greyhound bus?

A Yes.

Q When you made contact with Terrance Bostick, what tone of voice did you use to speak to him?

A Normal conversational tone of voice.

Q Tell the Judge what Mr. Bostick was doing just prior to your making contact with him and what he had thought your contact with him was?

A He was in the very back of the bus resting on a red bag. I approached him, identified myself and asked him where he was traveling to. He said, Atlanta. I asked to see his ticket and I.D. and, then, he let me look at those. I returned those to him. I asked him for permission to search his bag for drugs. He said the red bag was his. He gave it to me to search. I searched it. I did not find any drugs.

There was a bag in the overhead rack which my partner asked him if that was his and he said, it was. I asked him to search that for drugs and he let me search that. I searched it and found the cocaine. I placed him under arrest.

Q What color was the bag you found the cocaine in?

A Blue.

Q Mr. Bostick was on the very last seat of the bus?

A Yes.

Q Where was your partner situated during the time in which you were talking to Mr. Bostick?

A Behind me further toward the front of the bus.

Q Mr. Bostick was in the very last seat on bus on the driver's side; correct?

A Yes. It's a larger seat. It's, like, almost two-thirds; full seat.

Q Was he lying down when you went back there?

A Initially, when I walked on the bus, I think he was.

Q Using the red tote bag as a pillow?

A Yes.

Q Did you ever find out whether or not, in fact, that red tote bag did belong to Mr. Bostick?

THE COURT: The red or the blue?

Q (By Mr. Dehart) The red one.

A The red tote bag did not have contraband in it and after we placed Mr. Bostick under arrest, we seized the red bag and the blue bag, both of which he said were his. We removed him from the bus and, at that point, another individual — his name is listed in the report. I think his last name is Williams. He came off the bus and said, "Hey, wait a minute, guys. That red bag is mine."

And to verify that, we asked Bostick and Bostick said, yes, the red bag is not really mine. I just borrowed it from that guy to use as a pillow.

Then to verify it even further, we checked with the bus driver. Did he, in fact, see anybody carry the red bag on the bus and he identified Williams as the guy who carried the red bag on the bus. So being that we felt that everybody pointed to the ownership of the red bag belonging to Williams and there was no contraband in it, we gave that bag to him. We did keep the bag which Bostick said was his, the bluish bag which contained the drugs.

Q When you made contact with Mr. Bostick, did you ask for identification?

* * * *

A Initially, I showed my identification and later on, as I stated, I asked Bostick to see his ticket and some I.D. and he showed me both and, then, I returned them to him.

Q Did you impede his way getting on the bus or block his way getting off the bus?

A No.

MR. DEHART: I have no further questions.

CROSS-EXAMINATION BY MR. STOSKOPF:

* * * *

Q All right. You didn't have a ticket to board this bus, either, Officer, did you?

A No.

Q Did you have specific permission from the driver of this particular bus on this particular day to enter that bus?

A I don't recall. I have seen the bus driver there many times and he knows us and he knows what we do on the bus but, this day, I don't recall whether I saw him or not before I boarded the bus.

Q Well, you don't recall if you did; is that correct?

A That's right.

Q Do you recall giving a deposition, Officer, to me on —

A I gave you a deposition.

Q Do you recall the answer to this question, "Now, before you boarded the bus on that morning, did you seek out and receive permission from that particular bus driver to enter the bus?"

You answered, no.

Do you recall, then, that you did not have permission?

A If it's down there, I'm sure I said that. It's really not important to me now and I don't recall right now.

Q All right. Did you have an arrest warrant or search warrant on that particular morning?

A No.

Q Did you have any sound suspicion that there was any criminal activity by or of anyone on that particular bus that morning?

A No.

Q This was a random citizen contact; isn't that correct?

A Sure. Yes.

Q And how often do you go on the bus, on this particular bus at the Greyhound station on a weekly basis?

A Right now, none.

Q Well, during that time?

A It was part of our duties daily unless we were in court.

Q All right. And you also check out the airport and the train stations, too; correct?

A Yes.

Q Is there an occasion, when you check out the airport or train station, that you enter the train itself or go on the train itself or at the airport when you enter on an airplane itself?

A That has occurred, yes; both instances.

Q And that, again, is on a random, citizen contact with no founded suspicion?

A Sometimes it is. Sometimes we have founded suspicion. Sometimes we have a search warrant. It varies. In this case, we did not have a search warrant and it was a citizen/police encounter.

Q Now, Officer, on this particular morning, you were carrying a firearm, were you not?

A Yes, I was.

Q And were you not carrying that firearm in a little pouch in your hand?

A I really don't recall where I was carrying it but, after talking with my partner, I think I did have it in a pouch that day.

Q And you had one hand carrying the pouch and another hand on the firearm inside the pouch; isn't that correct?

A That is not true.

Q Well, when you approached the defendant at the back of the bus, where did you have the firearm?

A In my bag, if I did in fact have a bag that day. I don't recall.

Q Well, where was the bag? How were you carrying the bag?

A It would be in my hand if I had it.

Q Do you keep it zipped or unzipped?

A I usually keep it zipped.

Q So your testimony today, to your recollection, there's never been an occasion when you carried the pouch with one hand on the firearm when you approach somebody?

A There have been many times I had a hand on the firearm.

Q All right.

A In this case, I don't really recall.

Q Now, when you approached the defendant, what was he doing?

A Just resting on the red bag.

Q Well, he could have been sleeping, too, couldn't he?

[objection deleted]

THE COURT: Are you talking about the position? Was he sitting up, stretched out?

THE WITNESS: He was leaning over in a comfortable position. He wasn't sleeping because I introduced myself and he responded back to me.

Q (By Mr. Stoskopf) Well, first you told him to stand up, didn't you?

A No.

Q The other officer asked him to stand up?

A No.

Q So he was lying down or in a resting position and your first conversation with him was what then?

A Hello. I'm Detective Joe Nutt with the Broward County Sheriff's Office. Do you have a minute to speak with us. This is with badge and I.D.

Q What did he reply?

A Okay.

Q And he stayed laying down on the seat, or did he sit up or stand up at that point?

A He shifted up in a position where he could talk with us.

Q What did he ask you, if anything?

A I asked him questions.

Q Well, did he respond in any manner at all when you told him that and informed him you were a police officer?

A He responded that he would talk. Fine.

I then asked him where he was traveling to. He said, "I'm going to Atlanta."

I then asked him could I see his ticket and I did. [sic] He showed both of them. I returned them to him. We were having a conversation. I was doing most of the questioning, though.

Q Did the ticket confirm the fact that he had boarded the bus in Miami and purchased a ticket to Atlanta?

A I don't recall.

Q Well, did he show you the ticket?

A There was nothing out of the ordinary with his ticket or I.D. when I looked at them.

Q He told you he was going to Atlanta. Did the ticket confirm that fact?

A I don't know.

Q Did he show you identification?

A Yes, he did.

Q What did he show you?

A I think, a Florida's driver's license.

Q That didn't raise any level of suspicion or any founded suspicion of any criminal activity; isn't that correct?

A I did not have any suspicion whatsoever up until the time I found the cocaine. At that point, I did [sic] the PC and arrested him.

Q While you were asking the defendant here these questions and searching the bags, the red and blue bag, where was Williams?

A I have no idea.

Q Well, don't you recall a couple young, black fellows in the back of that bus that morning?

A I recall Williams as being a black male but I don't recall where he was at.

* * * *

Q (By Mr. Stoskopf) Was there another young fellow back there, too, in the back of the bus; do you remember?

A I have no idea. This is back in August and I really don't remember.

Q Now, prior to when you boarded the bus, you were sitting in your car, isn't that correct, at the bus station?

A I don't know what I was doing before I got on the bus.

Q So you have no recollection of where you were immediately before boarding the bus; is that right?

A Well, immediately prior, I was on the sidewalk to board the bus but before that, I could have been numerous places.

Q Were you wearing the jacket that morning or did you put it on right before you got on the bus?

A I was wearing the jacket that morning when I was on the bus. I do not recall when I put it on.

Q The other officer put the jacket on, too?

A I think he did.

Q And how is that jacket marked to identify you as police?

A Broward Sheriff's Office patches on the shoulders and on the front and on the back, it says, Sheriff's Office.

Q All right. During this period of time, did the defendant make any attempt to disembark the bus at that particular time?

A No.

Q And you had knowledge this bus, in fact, was in transit on the way out of state or going through Broward County; isn't that correct?

A I assume it was. It was not in transit when I was on it.

Q You didn't see the defendant board the bus there? He was already on the bus when the bus pulled up; correct?

A Correct.

Q You were there when the bus pulled in the terminal; isn't that correct?

A I think so.

* * * *

Q Officer, are you familiar with written consent forms?

A I've seen them, yes.

Q Have you ever had occasion to use them?

A I don't think I ever have.

Q Is there any reason why you can't carry them with you and get people to sign a written consent or waiver of consent to search?

A I guess not.

Q All right. You didn't have any in your possession on this particular morning, did you?

A No.

Q What words did the defendant use when he told you you could search the bags?

A Okay. Go ahead.

Q That's in reference to the red bag or the blue bag.

A Both of them.

Q Where was the blue bag?

A The blue bag was on the overhead rack.

Q Which bag was searched first?

A The red bag.

Q And he gave you consent to search that first, initially?

A That's correct.

Q And what words did he use to give you consent to search the blue bag?

A The same.

Q And in relation to the time, what was the time difference between the time you searched the red bag and the blue bag? Almost simultaneously or a while after?

A Well, I was searching the red bag, which ended up belonging to somebody else and we didn't find anything in it. And so the time difference between just finishing that up — it was a small bag and my partner was asking him if that was his blue bag in the overhead rack and I said, "Well, is that also your bag?"

And he said, yes.

I said, "Can I have permission to search that for drugs, too? You have the right to refuse."

And he said, "Okay. Go ahead."

My partner brought it down and started the search. I would say, probably, 30 seconds.

Q So what you're saying is that you received consent from the defendant first on the red bag and, then, a second consent on the blue bag; two separate consents, is that correct?

A Definitely. I had two separate bags.

MR. STOSKOPF: No further questions, Judge.

MR. DEHART: No further questions, Judge.

* * * *

(Thereupon OFFICER STEVEN N. RUBINO was called as a witness on behalf of the Plaintiff and, having been first duly sworn, was examined and testified as follows:)

* * * *

DIRECT EXAMINATION BY MR. DEHART:

Q Mr. Rubino, how are you employed now?

A Deputy sheriff, Broward County Sheriff's Office.

Q Back on August 27th, 1985, were you employed in the same capacity?

A Yes, I was, at the time, with the narcotics division of the Sheriff's Office.

Q And how long had you been working narcotics?

A At that time?

Q Yes.

A With the Sheriff's Office, about a year.

Q Were you working with a partner at that time?

A Yes, I was.

Q And in that capacity, did you make contact with a Terrance Bostick?

A Yes.

Q Was this on the Greyhound bus?

A Yes, it was.

Q Who made the first contact with Mr. Bostick?

A Myself and Detective Nutt boarded the bus. Detective Nutt is the one that did all the talking that day.

Q Now, Detective Nutt talked to Mr. Bostick. Where were you situated when Detective Nutt was talking to Mr. Bostick?

A Mr. Bostick was sitting in the last seat on the driver's side of the bus and I was in the seat right in front of him.

Q You were not in the aisle or anything?

A No. I was off the aisle in front of the seat.

Q And Mr. Nutt was speaking in a normal tone of voice?

A Yes, he was.

Q Were you in uniform as you are now?

A No, sir.

Q How were you dressed that day?

A I had casual clothing on and we also, when we boarded the bus, we wear raid jackets; green windbreakers with Sheriff Department patches, insignias on them.

Q Did you have a gun at that time?

A Yes, I did.

Q Was your gun concealed or exposed?

A Concealed.

Q Did you, in any way, use your gun prior to the arrest of Mr. Bostick?

A No, sir.

Q Are you familiar with the maroon and gray bag?

A Yes.

Q Who searched that bag?

A Detective Nutt.

Q Are you familiar with the blue bag?

A Yes.

Q Who searched that bag?

A Detective Nutt.

Q When was the first time you saw the blue bag?

A The blue bag was on the overhead rack above my head and Bostick's head on the bus.

Q Do you know why Detective Nutt would have searched that bag?

A Well, while Detective was — he had already received permission from Bostick to search the red bag which later, we found out it wasn't his in the first place and while he was searching the red bag, I asked Bostick if the blue bag was also his and he stated it was and Detective Nutt searched that bag, also. That's where the cocaine was found.

Q Did you see the search of the bag?

A Yes.

Q Did you hear Detective Nutt ask for permission to search any bag?

A Yes.

Q Can you tell us what he said and when he said it?

A I don't remember the exact words but he explained to Mr. Bostick who we were and our duties on the bus; that of being narcotic agents and we contact the traveling public and ask for permission to do a consent check of bags for drugs. He asked for permission and Bostick gave him consent and he looked.

Q Was that before or after your attention had been drawn to the blue bag?

A He asked for the red bag and, then, when I saw the blue bag and asked Bostick if it was his, Detective Nutt asked him if he could search that one, also.

Q What did he say when you said that?

A He said, yes.

Q This conversation between Detective Nutt and Mr. Bostick, was it in a loud manner?

A No; normal tone of voice.

Q Was there any intimidation or show of force used to coerce Bostick in any way?

A No.

Q Was his path blocked from leaving the bus or anything like that?

A No. He was free to go.

Q Had the bus pulled off or was the bus attempting to pull off during the time that you were having a conversation with Mr. Bostick?

A No, sir.

Q Did you ever find out who the maroon and gray bag belong to?

A Yes, we did.

Q And how did you find that out?

A There was another subject that was on the bus, Mr. Williams, he stated that it was his bag. He loaned it to Mr. Bostick to use as a pillow.

Q When did Mr. Williams tell you this?

A As we were getting off the bus with Mr. Bostick after he was placed under arrest. He came off the bus with us, Mr. Williams did, and we confirmed what he said with the bus driver and gave him back his bag.

Q Do you know where Mr. Williams was seated in relation to Mr. Bostick?

A I think he was on the passenger side in front of the bathroom which is a couple of seats in front of where we were, where Bostick was.

Q On a bus, you have a big seat in the back, the very last seat that stretches across two-thirds of the bus?

A That's correct.

Q Then you have a bathroom at the very back?

A Correct.

Q In front of the bathroom, you have another seat on the passenger side?

A Right.

Q That is the rearmost seat of the passenger side where Mr. Williams would have been seated?

A That's correct. It butts right up against the bathroom.

Q Did you see Mr. Williams while you and Detective Nutt were making contact with Mr. Bostick?

A I don't particularly remember. He doesn't stand out in my mind when we first walked back there, no.

Q He never spoke to you while you were talking to Mr. Bostick or anything like that?

A No.

MR. DEHART: I have no further questions, Judge.

CROSS-EXAMINATION BY MR. STOSKOPF:

Q Officer Rubino, did either you or Officer Nutt have a ticket to board that bus that morning on August 27th?

A No. We just get on and get off.

* * * *

Q Did either you or Officer Nutt seek permission of the bus driver, Mr. Black, to board that bus that particular morning?

A I don't remember if we did or not.

Q Did either you or Officer Nutt have a search warrant or arrest warrant to board that bus that morning in reference to anyone on that bus, particularly, the defendant, Mr. Bostick?

A No, sir.

Q Did either you or Officer Nutt have any reasonable, founded suspicion that there was any criminal activity on board that bus on this particular morning?

A No, sir.

Q This was just a random, public contact; isn't that correct?

A That's correct.

Q All right. Who entered the bus first?

A I don't recall offhand if it was Detective Nutt or myself. I believe it was him. He's the one that did the talking to Bostick.

Q He's kind of the lead officer? He has the experience, isn't that correct?

A When it comes to domestic intervention, yes.

Q You were already at the bus station prior to when the bus pulled in this particular morning, were you not?

A Yes.

Q You were sitting in your patrol car?

A I don't remember if we were sitting in the car or standing outside or where we were.

Q Well, this was about what time in the morning?

A About 8:00, 8:30.

Q What time did you go on duty that morning?

A Either 7:00 or 8:00.

Q Was this the first bus, then, this morning that you checked?

A I believe it was, yes.

Q Where did you put on your jackets?

A Where we park our cars right outside.

Q As the bus pulled in, you got out of the car, put your jackets on and went to the bus?

A I don't remember if we had put our jackets on and were waiting outside or sitting in the car.

Q Where, usually, do you carry your concealed weapon in plainclothes?

A Waistband.

Q Where does Officer Nutt carry his?

A I believe he has a, like, a man's purse he carries his gun in.

Q And often times, when he makes these drug interdictions, does he carry the pouch unzipped so the weapon is readily available?

A I've never seen him unzip it prior to.

Q He was carrying it in one hand?

A Yes. It's not very big. You can carry it in one hand.

Q Then, when he approaches a defendant or subject or a citizen for these random encounters, does he often-times put his hand on the gun inside the pouch?

A Not inside, no, sir.

Q Now, when you went on the bus, the first person you approached was, in fact, the defendant, Bostick, was it not?

A Yes, it was.

Q And Bostick, what was he doing in the rear of the bus when you approached him?

A Just sitting there.

Q Well, was he lying down, resting or sitting there?

A Leaning on an elbow half sitting and half lying.

Q Was his feet on the floor or up in the seat?

A I don't remember.

Q Well, he could have been sleeping or resting at that time; correct?

A I don't remember him sleeping.

Q All right. And the red bag was where?

A I believe right where his arm and head were.

Q All right. Now, you have testified that Detective Nutt had all the conversation with the defendant and all the interaction; is that correct?

A Other than asking if the blue bag was his that was on the rack.

Q Who asked him that?

A I did.

Q And what did he answer when you asked him that?

A He said it was.

Q All right. And did you say anything other than that?

A No. I believe Detective Nutt asked him if he could look in that one, also, and I took it down off the rack.

Q So he asked for permission before you moved it down off the rack, is that what you're testifying to, or after?

A I don't recall exactly. I believe it was before.

Q All right. What statutory authority did you have, on this particular morning, to enter the bus to ask passengers inside of a bus, interstate transportation of passengers, what statutory authority did you or Nutt use on this particular morning?

A We just boarded the bus. We do that almost every day.

Q Did Officer Nutt ever discuss with you on what authority?

A No. They were doing this before I entered the unit; working the buses.

Q You never questioned it either, then, is that correct?

A No.

Q What was the first conversation that you heard between the defendant and Officer Nutt on this particular morning?

A We identified ourselves, showed our badges and identification cards and Detective Nutt asked Bostick where he was traveling to.

Q What did he answer?

A I believe he said Atlanta, Georgia.

Q Then what happened?

A Detective Nutt asked to see his ticket and I.D.

Q And did he do so?

A Yes. He showed him his bus ticket and he had a Florida driver's license.

Q Did you look, also, at the identification he showed?

A No, I didn't look at it. I could see that he was holding it but I didn't look specifically at it.

Q During this period of time, you were standing behind Detective Nutt?

A Well, behind and off to one side. The last seat is a bench seat. It's three seats opposed to the regular seats which are just two, like this (indicating), and Mr. Bostick is sitting on the bench seat in the back and I was standing, like, right here (indicating) but standing up, facing him.

Q And Detective Nutt was also standing up in the aisle facing the defendant?

A He was standing next to me but kind of half-and-half.

Q All right. And did he have his hand on the pouch at that time when he was in conversation with the defendant?

A He was holding it. I don't know what you mean by his hand on the pouch.

Q Well, you were both standing in the aisle between the seats, facing the rear seat; isn't that correct.

A I wasn't in the aisle. I was in the seat but not sitting down; standing up.

Q Where was Detective Nutt?

A Next to me.

Q He was in the aisle?

A Half-and-half.

Q And where was this Williams? Wasn't he sitting within about four, five seats from the rear of the bus?

A It's about that, yes, sir.

Q And when you both walked to the back of the bus, everyone's attention was focused on you; isn't that correct?

A I don't know.

Q Well, you weren't passengers getting on and when you got on, you immediately walked to the rear of the bus with green, police jackets on. Isn't it common that most of the people on the bus or on the passenger vehicle that you enter kind of focus their attention on you when you do so?

A I don't know. I don't pay attention to anybody else but the person I'm talking to. I don't look around to see if other people are watching me or not. It's not my concern.

Q Well, you are aware when you're making these drug interdictions, that other people are on the bus and you are prepared to ask them questions and search their bags, too, with permission, aren't you?

A That depends.

Q It depends on their permission?

A Or if we made an arrest before we get a chance to talk to anybody else on the bus.

Q If Mr. Bostick wasn't there, you would have started at the rear and worked your way up toward the front; correct?

A Correct.

Q Is that a standard procedure?

A Yes.

Q And you would have asked someone else on that bus, would you not have, for permission to search?

A It's possible.

* * * *

Q Getting back to this consent, what word did the defendant use when Nutt asked him if he would mind him going through the red bag first? What did he say?

A What did Nutt say?

Q Tell me again the conversation.

A We explained to him our duties, like I stated earlier, and asked for permission to search the bag and Bostick gave an affirmative answer. I don't know exactly what he said at this time. He either said, yes, or go ahead, something to that effect.

Q All right. And at that point, who searched the red bag?

A Detective Nutt.

Q How long after that did you call attention to the blue bag up front?

A It was while he was searching the red one.

Q All right. And who brought the blue one down from the top?

A I did.

Q And when you brought the blue bag down, Detective Nutt was still searching the red bag?

A I don't remember if he was or not. I don't know if he had concluded it or was still looking.

Q How did he conclude the search of the red bag? Did he put all the belongings back inside first or —

A I believe he zippered it up and went to the blue one.

Q Who put the things back in the red bag?

A Detective Nutt.

Q Then he went right to the blue one?

A Yes, sir, I believe so.

* * * *

(Thereupon TERRANCE BOSTICK, the defendant herein, was called as a witness in his own behalf and, having been first duly sworn, was examined and testified as follows:)

DIRECT EXAMINATION BY MR. STOSKOPF:

Q State your name and address.

A Terrance Bostick, 1127 Northwest 1st Place, Apartment 5.

Q All right. Was there an occasion, Mr. Bostick, in August of 1985, that you bought a bus ticket?

A Yes, sir, I did.

Q And what was your destination?

A Atlanta.

Q Where did you board the bus?

A Downtown Miami.

Q And what day of the week was this; do you recall?

A It was Monday morning, to my recollection.

* * * *

Q What time did you board the bus?

A About 6:00, 6:30, something like that there.

Q All right. Was it your intention, when you boarded that bus, to stay on that bus until you reached your destination in Atlanta, Georgia?

A Yes, it was.

Q Did you, at any time, attempt, or was it your intention to disembark the bus in Broward County or Fort Lauderdale for any reason whatsoever?

A No.

Q All right. Was there a time when the bus pulled into the station in Fort Lauderdale?

A Yes, there was.

Q All right. And what were you doing when the bus pulled in the station?

A Well, I was laying in the back, trying to get some sleep.

Q And did you have an occasion to have in your possession, a red bag at that point?

A Well, it wasn't my red bag. It was a young man on his way to Kentucky or somewhere.

Q How did you happen to get possession?

A We were just talking and I wanted to go to sleep and I have no bag and I asked, can I borrow one of his bags.

Q He loaned you the bag?

A Yeah.

Q And what next do you remember when the bus was parked in Lauderdale at the bus station?

A I was sleeping. I felt someone touching on my feet. I was laying across the back of the bus.

Q What happened then?

A The officer, the little skinny one said, "Do you have any I.D.?"

He asked me did I have a bus ticket first. I said, yes, sir, I did.

He said, "May I see it?"

And I showed it to him.

And he said, "Do you have any identification?"

Q And what did you respond?

A I said, "Yes, sir."

Q And you showed him identification?

A Yes.

Q What did you show him?

A My driver's license.

Q Then what happened?

A And then he says, "Well, is this your bag?"

Then I says, "Yes."

Then I didn't answer.

He said, "Can I search it?"

And I looked at Williams and he said, "Yes, sure."

Q Then what happened?

A He went to searching through the bag.

Q Then what happened?

A Then from there, they asked Mr. Williams was all them bags his up there and they asked him can they search his bags and things. They search his bag and, then, the gentleman on the other side, they went fumbling through his bag.

Q At any time prior to when they searched the red bag or any other bags on that bus, did they ask permission to search?

A On the red bag, yes.

Q What did you tell them?

A I asked Mr. Williams' permission at first.

Q Now, did there come a time when they asked your permission on the blue bag?

A Yes.

Q What did you say?

A I didn't quote [sic] anything.

Q Well, who else was in the back of the bus other than you and Mr. Williams?

A It was a fellow going to Detroit. I can't think of his name. And there was an old man, old, Caucasian male that had just got on the bus.

Q Well, when these conversations were going on between you and the officers, were the rest of the people turned around in their seats, watching and listening?

A Yes.

Q Now, your testimony is here today that prior to the search of the blue bag, that you never granted permission or consented to either one of these officers to search that bag?

A No, sir, I didn't.

Q When Detective Nutt first approached you, what did he have in his hand, if anything?

A A black pouch.

Q All right. What did you believe to be in that pouch?

A A pistol, the way he was gripping it.

Q All right. Did he, at any time, take out identification and identify himself as a police officer?

A After he looked at my identification and everything.

Q Okay. Did he say anything else to you?

A No, sir.

Q Did he ever advise you, Mr. Bostick, that you could refuse a consent to search and that you would be free to leave or free to continue your journey? Did he ever advise you of that?

A No, sir, he didn't.

Q Did he ever advise you that he was in some kind of drug interdiction program or have a conversation similar to what you heard from the other officer here today?

A No, sir, he did not.

Q Have you ever been arrested before, Mr. Bostick?

A Yes, sir, I have.

Q You have had several little incidents with the police, have you not?

A Yes, sir.

Q It is your testimony here today that you would not voluntarily consent to any search of your bag, particularly, when it might have contained drug substances?

A Right.

MR. STOSKOPF: No further questions, Judge.

* * * *

CROSS-EXAMINATION BY MR. DEHART:

Q Mr. Bostick, did you know that cocaine was in your bag?

A No, sir.

* * * *

Q (BY MR. DEHART) For all you know, there was nothing in that bag but the clothes?

A To my knowledge.

Q Just like the first bag. So there's nothing unusual about consenting for someone to search your bag?

A The first bag wasn't my bag.

Q This first bag, you did tell him it's okay to search it?

A After I got consent from Mr. Williams.

Q You're saying that you asked Mr. Williams?

A Yes.

Q You asked him is it okay?

A Yes.

Q And that's when you said, okay?

A Yes.

Q How did you ask Mr. Williams that?

A Well, we were looking at each other and I did like this (indicating) and said, is it all right and he says, yes.

Q Mr. Williams is sitting on the opposite side?

A Of me.

Q And he's sitting in front of the bathroom?

A Right.

Q And you're sitting on the back seat?

A Right.

Q And Officer Nutt is halfway in the aisle and halfway on the seat in front of you?

A Yes.

Q And Officer Rubino is on the seat in front of you?

A No, he wasn't on the seat. He wasn't halfway on the bus at the time. Officer Rubino, the blond-haired one?

Q The blond-haired guy.

A Yes, with Nutt. The skinny one in jeans.

* * * *

Q * * * Nutt searched both bags; correct? Detective Nutt, the blond-haired guy you just saw, he searched both of the bags; correct?

A No.

Q Or he searched one?

A He searched one.

Q And the other guy searched the other one?

A The other guy searched the other one.

Q Did you ever see a gun?

A No, sir.

Q Now, was the pouch open or did he just have his hand —

A He just had his hand inside of the pouch.

THE COURT: What do you mean, inside of it?

THE DEFENDANT: Inside the pouch. He had it zippered like it ain't going to slip off his hand or nothing like that there.

* * * *

Q Let's talk about the ununiformed guy in here today, Detective Nutt, was that the guy who had the pouch?

A Yes.

Q Was that also the guy who searched Mr. Williams' bag?

A Yes.

Q Now, how did he search Mr. Williams' bag and keep his hand on the pouch?

A Well, he didn't have his hand on the pouch while searching the bag.

Q When did he have his hand on the pouch?

A When Mr. Nutt went to search — I mean Mr. Rubino went to search another bag. The uniform, I put it like that.

Q When Detective Nutt first approached you, he didn't have his hand in that bag, did he?

A No, no.

Q And when he first approached you, he did say hello?

A No. He woke me up. He tapped me.

Q He told you he was a police officer?

A No. He asked me did I have a bus ticket.

Q Okay. And what did you say?

A I says, sure. He asked me could he see it.

Q And he didn't say nothing else to you?

A And he seen my I.D. and everything, then he —

Q Wait a minute, now. You wake up and see this white dude that don't have nothing on but his uniform and he says, can I see your ticket and you say, okay?

A Yes. I know I had a ticket.

Q You didn't question him as to who he was or what he was doing?

A No.

Q And he never told you?

A No.

Q You just gave him the ticket?

A My identification.

Q And he asked, is there anything in your bag?

A Yes.

* * * *

Q You knew Williams before you got on there?

A No. I seen him once or twice from our community.

* * * *

Q So the first thing Nutt said was, whose bag is this?

A Yes.

Q He didn't say, can I search the bag first?

A No.

Q So he said, whose bag is this?

A He said, whose bag it was.

Q And when he said that, you didn't raise up and point across the aisle and say, his, did you?

A No, no.

* * * *

Q You said what?

A I said mine because I was laying on it at the time.

Q Now, at this time, you didn't know who he was from Adam?

A No.

Q And he hasn't shown you any badge or anything?

A He hadn't shown me any identification.

Q And so he starts searching the bag; correct?

A Yes.

Q Now, does he still have his hand inside his pouch when he's searching the bag?

A No, he did not.

Q His hands weren't inside the pouch yet?

A Not at that moment.

Q Where is his pouch?

A Under his shoulder right now.

Q Okay. And is he loud with you?

A Well, what you call loud?

Q Louder than this?

A Not louder than this.

Q Is he threatening you or anything?

A No, he wasn't threatening me.

Q He's just talking to you?

A Yes.

Q So you give him that bag and he searches it?

A Yes.

Q You never tell him that it's Williams' bag?

A No.

Q There was a blue bag there?

A Yes.

Q And that blue bag was overhead?

A Yes.

Q And that blue bag was taken down; correct?

A Yes.

Q Who took down the blue bag?

A The uniform one.

Q The uniform guy that was in here today, his name would be Rubino; correct?

A Yes, yes.

Q And are you saying that Rubino searched that bag?

A Yes.

Q And Nutt didn't search that bag at all?

A Well, Rubino opened it and both searched it together. He pulled it down off the rack.

Q Did they ask you whose bag that was?

A Yes.

Q And what did you say?

A I replied, yes, it was mine.

Q Did they ask you to search the bag?

A No.

Q Did you say, stop, don't search my bag?

A No. It was already open.

Q Did you ever tell them to stop, don't search this bag?

A No, sir.

Q Did you ask him what right you got searching this bag?

A No, sir.

Q They hadn't even showed you any badge, hadn't showed you anything?

A At the time, no.

Q They were just some dudes going through your bag; right?

A Yes. They went through all the other folks' bags, also.

Q Wait a minute. You're number one.

A Yes.

Q You're sitting in the back. They go all the way on the back of the bus and start working forward?

A They didn't search the red one, then, the blue one. They searched the red one and searched Williams' luggage.

Q You were the first person on the bus so they hadn't searched anybody when they searched your bags; correct?

A They searched the red one first, then, they searched the rest of them.

Q And they had never told you anything about who they were?

A No.

Q And you never objected to these two white dudes going through your bag?

A No.

Q What were you thinking?

A I was trying to get some rest.

Q You really didn't care about them searching the bag?

A If it was up to me, yes, I did care but, then, who was I to say?

Q Did you pack that bag?

A No, sir, I did not.

Q You didn't pack the bag?

A No.

Q Was that your clothing inside the bag?

A A pair of slacks, yes.

Q I mean, the clothes inside the bag? I'm talking about the blue bag, the clothes inside the bag, they were yours?

A Yes.

Q And you packed the bag?

A Yes.

Q And you knew that there was cocaine in the bag?

A Yes.

Q Did they ever tell you that they were police officers?

A No, sir, they did not.

THE COURT: Well, when?

THE DEFENDANT: When they arrested me.

Q (By Mr. Dehart) They said, you're under arrest?

A Yes.

Q Was that on the bus when they said you're under arrest?

A Yes.

MR. DEHART: I have no further questions.

* * * *

REDIRECT EXAMINATION BY MR. STOSKOPF:

Q Mr. Bostick, is the first thing you saw when you got up was a hand in a pouch?

A Yes.

Q And you had a lot of reason to believe what was inside that pouch?

A Yes.

Q Did you think there was a firearm inside that pouch?

A Yes, yes.

Q All right.

A He asked me, why didn't you try to run. That's what Nutt said.

Q When did he ask you this?

A After he was taking me off the bus?

I said, "For what? So you cold shoot me in the back?"

Q Well, Defendant Bostick, you have given the impression here in court today that you never knew that these were police officers.

A No, sir. They never identified themselves as officers. I knew they were officers. They never did identify themselves.

Q Well, when they woke you up and the officer had his hand in the pouch with a firearm, who did you think they were then?

A Officers.

Q All right. Now, one more time, did they ever ask and did you ever give consent to search the blue bag, the bag the cocaine was found in?

A No, sir, I did not.

MR. STOSKOPF: No further questions.

MR. DEHART: I have no further questions.

* * * *

THE COURT: Judge Moe has ruled on these, hasn't he? I think it's going up.

MR. DEHART: On the consent on these bus stops, on the validity of entering the bus?

THE COURT: Yes. Well, whatever the issue is, he didn't like the whole picture, which I'm not crazy about, either, but when you've got sworn testimony from two police officers and they're testifying, sometimes you don't have much other than that and you have to go along with the sworn testimony but it does really stretch the imagination when they're standing there in an aisle and talking to someone and just checking all the bags. It's very intimidating even if there is consent.

* * * *

THE COURT: But the police do have a right — and I guess you and I would, too — we can step on a bus and walk in and talk to somebody and I guess the police can step on a bus and walk up and talk to somebody and say, can we check your bag. I don't know if that's contrary to any law, is it?

MR. STOSKOPF: They would have an opportunity on a public road but, in this case, it's at the Greyhound station that is quasi-public because you have people coming in and out and boarding the bus. My legal point is, I don't think they would have a right to enter an airplane without reasonable suspicion first that someone on that particular plane was committing something and then, they have founded suspicion to go in and use the stop and frisk law to ask them for identification. If there's no reasonable, founded suspicion as in this case, there isn't — my theory is, they do not have a right to step on board a private Greyhound bus to talk with passengers that are on

an interstate vehicle as a passenger going from Dade County to Atlanta and they do not have that right. They don't have a statutory authority for stop and frisk unless they have a reasonable, founded suspicion prior to their confrontation. If they do, then, they can go after anyone in Broward County but if they don't have that, they have no right or authority to enter a Greyhound bus to interact with the passengers. That being so, even if you find, by the preponderance of the evidence, that he gave consent, my theory is, it is invalid.

In this case, I think the evidence is that he didn't give consent, plus, if you recall that he did, my theory is that they don't have the right.

MR. DEHART: If it please the Court, Your Honor, I can get case law that says a contact is not a stop and frisk. It's less than even that and a contact is simply that. It is a social interaction. It is just about what they have called it and that is no burden whatsoever. There's no reasonable suspicion. There is no nothing. It is just a random contact, therefore, the "stop-and-frisk" law really doesn't apply to this because they don't need reasonable suspicion or anything. It is just a contact.

* * * *

[Whereupon the court adjourned without ruling on the motion to suppress].

IN THE

Circuit Court of the 17th Judicial Circuit, in and for Broward County, Florida
Criminal Division

Case No. 84-10543 CF

STATE OF FLORIDA,

Plaintiff,

vs.

TERRANCE BOSTICK,

Defendant.

1461 Northwest 17th Avenue
Miami, Florida
Friday, June 6, 1986
1:35 p.m.

DEPOSITION OF GEORGE A. BLACK

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taken before Eva Sosa, Court Reporter and Notary Public in and for the State of Florida at Large, pursuant to Notice of Taking Deposition filed in the above cause.

APPEARANCES:

JAMES DEHART, ESQ.
Assistant State Attorney
On behalf of the Plaintiff.

LAW OFFICES OF MAX P. ENGEL
By: LOUIS B. STOSKOPF, ESQ.
On behalf of the Defendant.

* * * *

Thereupon—

GEORGE A. BLACK,

a witness herein, called at the instance of the Defendant, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION BY MR. STOSKOPF:

Q Mr. Black, would you please state your name and address, please.

A George A. Black, III., 3640 Northwest 9th Street, Fort Lauderdale.

Q All right.

What is your occupation, Mr. Black?

A Greyhound operator, bus driver.

Q How long have you been in that capacity?

A 16 years.

Q Did you have occasion to be in charge of the Greyhound bus on August of 1985 in which there was an arrest made of the defendant in this case, Mr. Bostick?

A Yes, I do. [sic]

* * * *

Q Now, directing your attention to when you came into the Fort Lauderdale station that morning, do you recall seeing the officers there that morning when you pulled in?

A Yes, because they were standing right out front.

Q And then relate now what happened when you stopped the bus in front of the Fort Lauderdale station, what took place?

A All right.

When I stopped the bus at Fort Lauderdale, I got out of the driver's seat and the two officers came up to the bus. I opened the door, because I recognized them. They got on the bus and I closed the door and went in the bus station and had a cup of coffee.

Q Do you recall specifically if either one of the two officers that got on the bus that particular morning requested permission from you to board the bus?

A No, he didn't say anything. I just recognized the green Broward County Sheriff's jacket. And normally they have been doing this for about, oh, two or three months, and I didn't recognize the tall guy, but—see, normally there is a young lady that checks the bus also and we recognize them, so we give them no hassle, we just let them on the bus.

Q But in this particular occasion neither one of the two officers requested permission to board your Greyhound on this particular morning, is that correct?

A Right, because when he came up to me I had my back turned. And when I turned around and looked he was boarding the bus. And, all I saw was the Broward County Sheriff's green jacket. So normally I don't say anything, I just close the door and let them do their job and I go have me a cup of coffee while they are doing it.

Q If the officers do not board your bus, approximately how long are you there in the bus station on a normal route, when it's not searched?

A Okay. We have a certain time, we have a pickup time and a leaving time. They don't give us two or three minutes there. When I get to Fort Lauderdale, I load my passengers up, load my freight and I leave and that's it.

* * * *

Q Am I to assume you loaded these people and took their tickets and everything prior to when the officers boarded the bus or did you do it subsequent to the officers boarding?

A Okay.

This is what happened. I loaded the two kids from the Job Corps. And, at this time I was given some information to one of the passengers that was standing outside of the bus. And, at this time that's when two officers came up and when I turned and looked he was boarding the bus. And, that's when I closed the door and told the person that as soon as the officers got through checking the bus that I'd load them on the bus. So I went inside and had a cup of coffee.

Q And this particular passenger then waited outside the bus?

A They waited outside the bus.

Q And the reason why you told them to wait outside the bus is because the officers were on the bus?

A Yes.

Q And you closed the door for what reason?

A Because I didn't want—I guess I didn't want them to be disturbed while they were doing their check. I closed the door to keep other passengers from getting on while they were doing their check.

Q All right.

* * * *

Q Now, normally if the officers would not have boarded the bus to search, what would you have done after taking the tickets from the passengers?

A Go inside the station, call the station in Miami, the dispatcher in Miami, let him know how many passengers I got and how many passengers I'm going to arrive with in West Palm Beach.

Q And then what?

A Then I leave.

Q How do you leave the bus when you leave the bus and go inside and call?

A I close the door and go inside.

Q And the reason for you to close the door when you go inside the bus station is for what reason?

A To keep anyone from getting on without me seeing the tickets.

Q All right.

Mr. Black, what are your rules and regulations as far as people going inside the Greyhound bus? Can anyone go inside the bus, a Greyhound bus when it stopped to pick up passengers at a bus station?

A Not without showing us a ticket or having valid reason for getting on the bus, they cannot go on the bus.

Q Does anyone have a valid reason to ever open and close the baggage compartment on the Greyhound other than you and the baggage handler?

A No one.

Q Has in the past, Officer Hutt [sic], who you recognized, I assume that morning, correct?

A Uh-huh.

Q Has he ever in the past opened the baggage compartment of the bus there without you permission?

A Yes, he have. [sic]

Q And have you had a discussion with him on any occasion pertaining to his authority to open the baggage or anything?

A No. No, I never had a discussion with him on that part.

Q All right.

On this particular morning then, after the officers were inside, then you said you went inside and had a cup of coffee. What was the time lapse from the time you were inside to when you went back to the bus?

A It was 20 minutes, and it was too long. Normally when they check the bus it takes five, 10 minutes and they finish. But, this particular morning it took 20 minutes. And, I wanted to know the reason why it took so long.

Q You went back to the bus?

A I went back to the bus.

Q And what happened then when you went back to the bus?

A When I went back to the bus I went to open the door. At this time this is when they had Bostick in handcuffs bringing him off the bus. It was approximately—they was right at my seat, coming off the bus when I went back to the bus. And, so I stepped back and let them off the bus.

When I stepped back and let them off the bus then this kid came up to me and said, "Driver, they have my bag." So, I went to the officer, the tall guy and I told him he had the wrong bag, he had the kid's bag. The kid was going to Job Corps and needed his bag. And, this is when the officer told me that—he asked me a question, "Are you trying to tell me my job?" I said, "No, man, I'm not trying to tell you your job, I'm just saying"—I used the expression, "Wrong damn bag." The guy is not coming to Fort Lauderdale for two years, how they hell are you going to get his bag to him. By the time he gets his Job Corps—then me and him got in a slight hassle.

I went inside the bus station to call my supervisor to let him know what was going on, there was a traveler and the officer had no reason to take his bag.

So I told the officer to look in the bag to see if there is anything in there. He told me, "It's loaded with cocaine." That's when I shut up. Then the kid kept bugging me. I went back in the office, "Why don't you search the bag—see if there is anything in there." So, he searched the bag and it was toilet articles and he gave the kid his bag back.

By this time I called my supervisor and the officer was talking to my supervisor, but he didn't give me the phone back, he hung up. And, my supervisor called me back and she said, "George, that was a pretty nasty officer, wasn't it?" I said, "Yes, if I could take him in the back me and him would tie it up."

Then I hung up. Then I went back to the bus and loaded the rest of my passengers and I took off, never heard any more of it.

Q So your testimony then is if it hadn't been for the officers boarding the bus at that particular time when they did, you were prepared to leave at that time as soon as you made your phone call?

A As soon as I made my phone call I was prepared to leave.

Q Is it your testimony today that the officers boarding the bus they delayed the bus in its normal schedule of leaving?

A I think I was 30 minutes late getting to West Palm Beach, but I made time up on the Turnpike, so I was like 10 minutes late getting to Orlando.

Q And you were on schedule, on time when you arrived at Fort Lauderdale?

A I was on time, yes.

Q Now, have you ever been on the bus in the past, Mr. Black, when the officers searched anyone? Had you ever remained in the bus and observed them and overheard them when they searched?

A No, I never do that.

Q So, it's your testimony then that you always disembark and if the officers go on the bus you go into the station, drink a cup of coffee and you wait till they come off the bus, is that correct?

A That's correct.

Q Has the Greyhound Corporation ever issued any instructions or any directives on how the bus drivers or the station managers are to handle searches by officers, to your knowledge?

A No.

Q Have you ever made inquiry to Greyhound or anyone in the managing capacity as to how you should proceed in the future or back in August of '85 how you should handle the officers when they request to search the bus?

A Well, I talked to one of my supervisors, Mr. John Parre when he was down here. He is not here any longer. I talked to him about it. And, I just didn't like the way they was doin' it. They hassled some of the passengers. A lot of the drivers are getting very pissed off about it, especially the older drivers. They are making all the schedules late leaving Fort Lauderdale and they got to leave Jacksonville and they're trying to get home. So, the hassle is they are hassling the people and they are delaying the schedule. I talked to the supervisor. They tell us there is nothing they can do about it.

* * * *

CROSS EXAMINATION (by telephone) BY MR. DEHART:

* * * *

Q Is it correct that you didn't hear any of the conversation with Mr. Bostick?

A No, I didn't hear what was going on inside the bus.

Q * * * Did you say that Mr. Bostick got on and he began to tease you about being black, that's how you recognized Bostick?

A Yes.

* * * *

Q Did he have any baggage with him then?

A To my recollection I think he had a small bag, like a gym bag or something like that.

* * * *

REDIRECT EXAMINATION BY MR. STOSKOPF:

Q Mr. Black, you mentioned that they search the bus all the time and they frequently search the baggage in this period while you were driving this route, is that correct.

A Right.

* * * *

Q So by boarding the bus while you're standing there and before the passengers get on, they were supposed to get on that bus, they delay the departure of that bus by the fact they get on the bus, is that correct?

A Yes, they do.

Q No matter how fast they search the bus, the fact is that they delay it?

A They delay it.

* * * *

In The

Circuit Court of the 17th Judicial Circuit, in and for Broward County, Florida
Criminal Division

Case No. 85-10543-CF

STATE OF FLORIDA,

Plaintiff,

vs. Florida Bar #: 109795

TERRANCE BOSTICK,

Defendant.

SUPPLEMENTAL MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION TO SUPPRESS

COMES NOW the Defendant, TERRANCE BOSTICK, by and through his undersigned attorney and files this Supplemental Memorandum in Support of Motion to Suppress and states as follows:

A summary of testimony and depositions submitted in evidence as to important issues is outlined below.

In this case, please note that the following designations will be used:

"D" - Deposition of witness George A. Black.

"T" - Transcription of testimony at hearing on Defendant's Motion to Suppress heard on March 24th, 1986.

Defendant was a paid passenger on a federal licensed interstate carrier who was ticketed, hence contracted, for interstate transportation from Miami to Atlanta, Georgia.

A scheduled stop was made in Fort. Lauderdale, Florida to disembark and embark passengers.

Several passengers disembarked and several passengers boarded. (D-7). The bus driver then normally closes the bus door, walks into the office, telephones Miami and informs them of his passenger count. (D-9). He then walks back to the bus and departs. This scheduled stop normally takes approximately five minutes. (D-7). If officers board the bus to conduct their investigatory citizen contact, the scheduled stop is invariably delayed. (D-23).

On Defendant's arrest date due to the officers actions in boarding Defendant's bus and searching Defendant belongings, the bus was delayed over 20 minutes. (D-11).

On the subject date no permission was sought by the officers of the bus driver to board the bus nor did the bus driver grant permission. (D-6,7). The officers do not refute this fact in testimony during the hearing nor on deposition. The driver does admit on deposition he observed the officers board the bus knowing their purpose. (D-6,7). After the officers boarded the bus the driver closed the bus doors and went to drink coffee waiting for the officers to exit the bus. (D-8).

The driver further testified that upon his return to the bus he opened the doors, stepped on the bus and had an immediate conversation with witness Bryant K. Williams of the Job Core program. Mr. Williams was complaining that the officers had taken his red bag that he had loaned Defendant Bostick. Defendant was being removed from the bus. The driver intervened and the red bag was returned to witness Mr. Williams.

There exists conflicting testimony from the other four witnesses, as to the conversation between Defendant and the officers in the rear of the bus which bears directly on the issue of consent.

The officers position is of course they identified themselves, informed Defendant of the nature of their inquiry regarding drugs, asked for Defendant's permission to 'search' both bags, and advised Defendant that he had a right to refuse. All witnesses agree the red bag was searched first and produced nothing. The blue bag was pulled down from the overhead rack and searched second. The drugs were found wrapped in a paper bag, inside of a plastic bag, inside the blue bag.

* * * *

(5)

No. 89-1717

IN THE

Supreme Court of the United States

October Term, 1990

STATE OF FLORIDA,

Petitioner,

vs.

TERRANCE BOSTICK,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

PETITIONER'S BRIEF ON THE MERITS

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111 Georgia Avenue, Room 204
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Attorneys for Petitioner

QUESTION PRESENTED

MAY THE POLICE, WITHOUT VIOLATING THE FOURTH AMENDMENT, BOARD AN INTERSTATE BUS AND ASK FOR, AND RECEIVE, CONSENT TO SEARCH A PASSENGER'S LUGGAGE WHERE THEY ADVISE THE PASSENGER THAT HE HAS THE RIGHT TO REFUSE?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

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ON WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

PETITIONER'S BRIEF ON THE MERITS

OPINIONS BELOW

The opinion of the Supreme Court of Florida is reported at 554 So.2d 1153 (Fla. 1989).

The opinion of the District Court of Appeal, Fourth District of Florida, is reported at 510 So.2d 321 (Fla. 4th DCA 1987).

The trial court's order denying the motion to suppress filed by Bostick is not reported (JA 1).

JURISDICTION

The Supreme Court of Florida issued its opinion on November 30, 1989, and denied rehearing on January 29, 1990. On April 26, 1990, Florida filed a petition for writ of certiorari, which this court granted on October 9, 1990. This court has jurisdiction. 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Amendment IV, *United States Constitution,* provides in pertinent part:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause...

Amendment XIV, Section 1, *United States Constitution,* provides in pertinent part:

> ... nor shall any state deprive any person of life, liberty, or property, without due process of law...

Article I, Section 12, *Florida Constitution,* provides:

> The right of the people to be secure in their persons, houses, papers and effects against the unreasonable interception of private communication by any means, shall not be violated. No warrant shall be issued except upon probable cause, supported by affidavit, particularly describing the place or places to be searched, the person or persons, thing or things to be seized, the communication to be intercepted, and the nature of evidence to be obtained. This right shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court. Articles or information obtained in violation of this right shall not be admissible in evidence if such articles or information would be inadmissible under decisions of the United States Supreme Court construing the 4th Amendment to the United States Constitution.

STATEMENT OF THE CASE

The following facts were adduced at the hearing on the motion to suppress evidence: Officer Joseph Nutt of the Broward County Sheriff's Office testified that on August 27, 1985, he and Officer Steven Rubino boarded a Greyhound Bus while it was stopped at the Fort Lauderdale station. This action was part of their daily duties in checking for narcotics violations. (JA 8,12). Officer Nutt proceeded to the back of the bus, where he saw Bostick resting on a red bag. (JA 9). The officer, in a normal conversational tone of voice, identified himself as a police officer. (JA 8-9,10,14). He asked Bostick where he was travelling to. Bostick replied that he was going to Atlanta. Officer Nutt then asked to see Bostick's ticket and identification. These were reviewed and returned to Bostick. (JA 9-10,15). At that point, the officer asked Bostick if the "red bag" was his. Appellant replied that it was. Officer Nutt asked Bostick if he consented to a search of the bag, and Bostick replied "Okay, go ahead." (JA 18). The red bag did not contain contraband, and was returned to its true owner, Bryan Williams, later. (JA 10).

Officer Nutt testified that his partner, Officer Rubino, noticed a bag in the overhead rack, and asked Bostick if it was his. When Bostick answered in the affirmative, Officer Nutt asked Bostick if the bag could be searched for drugs. (JA 9). Bostick again said, "Okay, go ahead." (JA 18-19). The search of this blue bag produced the cocaine, and Bostick was placed under arrest. (JA 9).

Officer Nutt testified that he and his partner were wearing plain clothes on that date, but were also wearing green windbreakers which had patches with sheriff's insignia. (JA 8,17). Officer Nutt also stated that he carried his police firearm in a hand carried pouch, which remained zipped throughout the contact with Bostick. (JA 8,13). Neither officer blocked or otherwise impeded Bostick from getting off the bus. (JA 11)

Officer Rubino also testified that they were wearing green windbreakers with sheriff's insignia. (JA 21). He confirmed that Officer Nutt carried his firearm in a zipped up pouch, which was not unzipped prior to approaching Bostick. (JA 27). Officer Rubino testified that he observed Officer Nutt explain to Bostick, in a normal tone of voice, that they were police officers, and what their duties were. Rubino heard Nutt ask Bostick for permission to search the red bag, and Bostick gave his consent. (JA 22-23,32). Officer Rubino quoted how he asked Bostick for permission to search the blue bag: "[c]an I have permission to search that for drugs, too? You have the right to refuse." (JA 19). Rubino stated that Bostick was free to go, there was no intimidation, no show of force against Bostick, and his path was not blocked. (JA 23). Bostick was in the last seat on the driver's side, with Officer Rubino standing in front of the seat in front of Bostick, and Officer Nutt was next to him, half on the seat and half in the aisle. (JA 21,30).

Terrance Bostick testified that he boarded the bus in Miami to go to Atlanta. (JA 33). When the bus arrived in Fort Lauderdale, he was laying in the back seat, trying to get some sleep. He had borrowed a bag from another passenger, as he had "no bag." (JA 34). Bostick stated the officers did not identify themselves as police officers until they looked at his "identification and everything." (JA 37). However, Bostick knew they were police officers immediately upon seeing them. (JA 47). Bostick confirmed that the officers were using a normal tone of voice, and that no threats were used on him. (JA 43). He never saw a gun, but he recognized the pouch as one containing a firearm. (JA 36-37,39). Bostick testified that the officer asked to see his ticket and identification, and he showed them to him. (JA 34-35). The officer asked him if the red bag was his, and he said "yes." The officer asked for permission to search the bag, and Williams said "yes, sure." (JA 35). Bostick stated that at no time did he tell the officers that the red bag belonged

to Bryan Williams. (JA 43). Bostick also acknowledged ownership of the blue bag. (JA 44). However, he stated that when asked for permission to search the blue bag, he "didn't quote (sic) anything." (JA 36). Bostick never asked the officers to not search the bag, and did not object to the search. (JA 44).

On these facts, the trial court denied the motion to suppress evidence. (JA 1). Appellant pled to trafficking in cocaine,[1] reserving the right to appeal the motion to suppress. The District Court of Appeal, Fourth District of Florida, per curiam affirmed the denial of the motion to suppress, and certified the following question to the Supreme Court of Florida:

> May the police without articulable suspicion board a bus and ask at random, for, and receive, consent to search a passenger's luggage where they advise the passenger that he has the right to refuse consent to search?

There was one partial dissent from the holding. *Bostick v. State,* 510 So.2d 321 (Fla. 4th DCA 1987). *Bostick* was one of six cases from two distinct prosecution districts decided by the District Court, all of which were reviewed by the Supreme Court of Florida.[2] The District Court reviewed one case, *State v. Avery,* 531 So.2d 182 (Fla. 4th DCA 1988), *en banc,* and held that the granting of the motion to suppress by the trial court should be reversed. The court took *Avery en banc* because it considered "the issue to be of exceptional importance." *Id.,* 531 So.2d at 184. Although the District Court treated *Avery* as the lead case, the Supreme Court of

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1 In violation of § 893.135(1)(b)(3), *Fla. Stat.* (1985).

2 *State v. Avery,* 531 So.2d 182 (Fla. 4th DCA 1988), *en banc,* reversed *Avery v. State,* 555 So.2d 1160 (Fla. 1989); *Mendez v. State,* 534 So.2d 774 (Fla. 4th DCA), reversed 554 So.2d 1161 (Fla. 1989); *McBride v. State,* 535 So.2d 652 (Fla. 4th DCA), reversed 554 So.2d 774 (Fla. 1989); *Serpa v. State,* 541 So.2d 799 (Fla. 4th DCA), reversed 555 So.2d 1210 (Fla. 1989); *Shaw v. State,* 543 So.2d 469 (Fla. 4th DCA), reversed 555 So.2d 351 (Fla. 1989).

Florida focused on *Bostick* instead. The court summarily reversed each case based on *Bostick,* without consideration of the factual variations in each scenario.

The Supreme Court of Florida rephrased the certified question as follows:

> Does an impermissible seizure result when police mount a drug search on buses during scheduled stops and question boarded passengers without articulable reasons for doing so, thereby obtaining consent to search the passenger's luggage?

In a four to three decision, the court answered the question in the affirmative, and quashed the lower court opinion. *Bostick v. State,* 554 So.2d 1153 (Fla. 1989). In so holding, the Supreme Court of Florida rejected the state's position that the initial contact between Officers Nutt and Rubino and Bostick did not rise to the level of a stop or detention which would implicate Bostick's fourth amendment rights, and that the encounter was consensual and voluntary. Instead, the majority opinion found that Bostick was "seized" at the time the officers approached Bostick. 554 So.2d at 1156-1157. The court concluded that a reasonable person would not have felt that he was free to leave during the encounter. 554 So.2d at 1157. The court further found that Bostick's subsequent consent did not overcome the taint of the illegal seizure. 554 So.2d at 1158.

The dissent articulated the controlling test as "whether a reasonable person would have felt free to terminate the encounter, given the totality of the circumstances." 554 So.2d at 1159. The dissent answered that question affirmatively, and found that the consent to search was voluntary. In so doing, the dissenters deferred to the trial court's factual finding that the consent was voluntarily given. *Id.* at 1160.

SUMMARY OF THE ARGUMENT

Whether or not Bostick was the subject of a fourth amendment seizure by Officers Nutt and Rubino must be determined by an assessment of the totality of the circumstances. If there was no improper seizure, then Bostick's consent to search his bag should be considered to have been voluntarily given. A seizure is generally determined to have occurred if a reasonable person believed he was not free to leave. *United States v. Mendenhall,* 446 U.S. 544, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980).

A review of the facts in the case at bar mandates a finding that there was no seizure of Bostick. No weapons were displayed. The officers were wearing plain clothes, with windbreakers identifying them as sheriff's officers. The officers used a normal tone of voice. When the officers requested that Bostick consent to a search of his bag, he was told that he had the right to refuse his consent. Bostick's identification and bus ticket were not retained by the officers. The officers did not block the aisle of the bus. No coercion was used. These facts show that Bostick was only part of an encounter. Therefore, the fourth amendment was not implicated, and Bostick's consent was voluntarily made.

The Supreme Court of Florida's decision expressly conflicts with decisions of the Circuit Courts of Appeals for the Fourth and Eleventh Circuits, as well as with a North Carolina court of appeal decision. Florida asserts that these other decisions are correctly decided and that unless reversed, the decision of the Supreme Court of Florida will undermine reasonable and necessary government efforts aimed at curtailing narcotic trafficking.

ARGUMENT

The Supreme Court of Florida erred by holding that Bostick was the subject of a "seizure" within the meaning of the fourth amendment of the *United States Constitution.* Viewing the situation under a totality of the circumstances test, Bostick was not the subject of a seizure, and the consent to search his luggage was voluntarily made. Florida suggests that the question presented be answered in the affirmative.

This court has consistently held that an assessment as to whether police conduct amounts to a seizure implicating the fourth amendment, and whether consent to search is voluntary, must take into account all the circumstances surrounding the incident. There is a seizure only if a reasonable person would not feel that he was free to leave. *Michigan v. Chesternut,* 486 U.S. 567, 108 S.Ct. 1975, 100 L.Ed.2d 565 (1988); *United States v. Mendenhall,* 446 U.S. 544, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980); *Schneckloth v. Bustamonte,* 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973). The government has the burden of showing that there was no seizure and that consent was voluntary. *United States v. Mendenhall; United States v. Blake,* 888 F.2d 795 (11th Cir. 1989). Inquiry must be made on a case by case basis. *United States v. Blake; Schneckloth v. Bustamonte.* However, a trial court's factual findings as to whether there was a voluntary consent to search may be disturbed on appeal only if they are clearly erroneous. *United States v. Blake.* The Supreme Court of Florida misapplied these principles. The state trial court found that Bostick's consent was voluntarily given. This ruling was improperly ignored by the Supreme Court of Florida, which revisited the facts and made its own factual conclusions.

Officer Rubino and Nutt approached Bostick who was lying down on the last seat of a Greyhound bus. (JA 9). They

identified themselves as sheriff's deputies whose task was to investigate narcotics trafficking in South Florida. (JA 8-9,10,14). They asked for Bostick's identification and bus ticket, which were reviewed and quickly given back to him. (JA 9-10,15). *Advising Bostick that he had a right to refuse permission to search his bag,* the officers requested his cooperation in allowing a search. (JA 18-19,22-23,32). The officer's tone of voice was conversational. (JA 9,23). Bostick consented to the search of the "red bag", which did not belong to him, and to the search of the "blue bag" which did belong to him. (JA 18-19). The search of the blue bag resulted in the seizure of the cocaine, and Bostick's arrest. (JA 9). The officers displayed no weapons. (JA 8,13,27). They were in plain clothes, with green windbreakers which identified them as sheriff's officers. (JA 8,17,21). The officers did not block the aisle, and they stated that Bostick was free to leave. (JA 11,23).

This court has found that an initial contact between a police officer and a person in an airport was not a seizure, and did not implicate the fourth amendment, when the police officer simply asked the person if he would step aside and talk with him. *Florida v. Rodriguez,* 469 U.S. 1, 105 S.Ct. 308, 83 L.Ed.2d 165 (1984). Similarly, the individual questioning of factory workers as part of a factory survey was a "brief encounter," rather than a seizure, since the manner of questioning would not have resulted in a reasonable fear that the workers were not free to continue working or to move about the factory. *Immigration and Naturalization Service v. Delgado,* 466 U.S. 210, 104 S.Ct. 1758, 80 L.Ed.2d 247 (1984). Mere questioning relating to a person's identity, and a request to see his identification does not constitute a fourth amendment seizure. *Id.* However, a seizure does occur when police officers stop an individual in an airport, ask to see his airline ticket and driver's license, hold on to the ticket and license while asking the individual to accompany them to a small room in the airport, and

retrieve that individual's luggage without his consent. *Florida v. Royer,* 460 U.S. 491, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983). The facts in *Royer* contrast sharply with those in the case at bar.

The fourth amendment is designed to prevent the arbitrary and oppressive interference by law enforcement officers with the privacy and personal security of individuals. *Immigration and Naturalization Service v. Delgado.* The actions of Officers Nutt and Rubino did not rise to this level of activity. As discussed above, whether or not Bostick voluntarily consented to the search, or was the subject of a seizure, must be determined upon review of the totality of the circumstances. In meeting its burden of showing voluntary consent, the government does not need to establish that it informed a person of his right to refuse consent to search his luggage. *Schneckloth v. Bustamonte.* Nonetheless, proof that a person had the knowledge that he had the right to refuse a search is "highly relevant" to a determination as to whether there has been voluntary consent. *United States v. Mendenhall.* The United States Court of Appeals for the Fifth Circuit has held that, in the context of airport stops, whether the law enforcement officers informed individuals that they were free to refuse consent to a search, and could contact a lawyer, does not absolutely prove uncoerced consent, but "does in many instances assuage the fear of a court that an individual was intimidated into consent to a search." *United States v. Berry,* 670 F.2d 583, 598-599 (5th Cir. 1982).

The mixed question of whether an individual was the result of a fourth amendment seizure, or voluntarily consented to a search was addressed by this court in *United States v. Mendenhall.* The majority opinion found that Ms. Mendenhall voluntarily accompanied drug enforcement agents to an office in an airport based on the following factors: (a) the woman was not told that she had to go to the office, (b) there were no threats or show of force, (c) the initial

questioning by the agents was brief, and (d) her airline ticket and driver's license were returned to her. *United States v. Mendenhall.* This court also noted that Ms. Mendenhall was informed of her right to refuse the search. *Id.* Justices Stewart and Rehnquist, in their concurring opinion, found that there was no seizure because there was no record support for the conclusion that Ms. Mendenhall had any objective reason to believe that she was not free to end her conversation with the drug agents and proceed on her way. *Id.*, 446 U.S. at 555, (Stewart and Rehnquist, JJ. concurring). This principle has been applied by several Circuit Courts of Appeals to facts very similar to those in the present case, and the courts have found that there was no seizure, and that there was voluntary consent. Florida urges the same result here.

The Eleventh Circuit Court of Appeals, in a case also arising out of Broward County, Florida, found that the defendant was not seized[3] although he was the subject of police attention on a bus. *United States v. Hammock,* 860 F.2d 390 (11th Cir. 1988). The facts in *Hammock* are virtually identical to those in the instant case, except that in *Hammock,* the defendant initiated the conversation with the police officers. Florida asserts that this one fact would not have been the controlling factor in the Eleventh Circuit's finding of voluntariness. A more recent case from the Eleventh Circuit Court of Appeals, again under similar facts, also resulted in the conclusion that there was no seizure, and voluntary consent. *United States v. Fields,* 909 F.2d 470 (11th Cir. 1990). In *Fields,* the Eleventh Circuit (which includes Florida in its jurisdiction) specifically rejected *Bostick,* stating: "[t]hese thoughtful opinions[4] disturb us,

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3 The court uses the term "arrest" throughout the opinion, but the authorities cited therein discuss seizure.

4 *Bostick v. State,* 554 So.2d 1153 (Fla. 1989); *United States v. Lewis,* 728 F.Supp 784 (D.D.C. 1990).

and we note, as Fields urges, that they impose almost a blanket prohibition on drug interdiction efforts such as the one at issue here." *Id.,* 909 F.2d at 473. In *Fields,* the facts were even more in the defendant's favor, since there was evidence that the police officer briefly retained the defendant's ticket. *Id.,* 909 F.2d at 474 n.1. The Fourth Circuit Court of Appeals has also upheld the voluntariness of a search conducted under similar facts on a bus. *United States v. Flowers,* 912 F.2d 707 (4th Cir. 1990). The North Carolina court of appeal also addressed a similar case, and found that consent "could not be more freely given." *North Carolina v. Christie,* 385 S.E.2d 181, 185 (N.C. Ct. App. 1989). That court noted that the law enforcement officers did not act more intrusively than necessary in pursuit of their goal of drug interdiction by boarding the bus. *Id.*

The Circuit Court of Appeals for the District of Columbia has found that an encounter between police officers and a train passenger, where one police officer opened the door to the passenger's roomette, identified himself, and asked permission to ask the passenger questions, was not a search or seizure, even though three police officers stood in the doorway and aisle of the train. The court held that these actions would not have prevented a reasonable person from feeling that he was free to end the encounter. *United States v. Tavolucci,* 895 F.2d 1423 (D.C. Cir. 1990). *See also, United States v. Carrasquillo,* 877 F.2d 73, 76 (D.C. Cir. 1989). Certainly, if citizen contact on a train is a mere "encounter," similar contact on a bus would also be an encounter. A passenger has more of an expectation of privacy in a train roomette than a bus seat. *United States v. Tavolucci* at 1425.

The bright line rule set forth by the Supreme Court of Florida that a citizen encounter made on a bus automatically rises to the level of a seizure, frustrates the legally necessary totality of the circumstances and case by case analysis. Certainly some encounters on a bus do constitute

a seizure.[5] Some of the circumstances which may weigh an analysis in favor of finding that there was a seizure were set forth by the Eleventh Circuit Court of Appeals in *Hammock:* the blocking of an individual's path, the retention of a ticket or identification, an officer's statement that the individual is the subject of an investigation, or that a truly innocent person would cooperate with the law enforcement officer, the display of weapons, the number of officers present and their demeanor, the length of the detention, and the extent to which the officer restrained the individual. *United States v. Hammock,* 860 F.2d at 393.

Applying these criteria to the encounter between Officers Nutt and Rubino with Bostick mandates a finding that there was no seizure, and that his resultant consent was voluntarily made. The mere fact that the encounter took place on a bus does not require a finding of per se coercion, as was found by the majority of the Supreme Court of Florida. The majority opinion does not even address how the trial court's finding of voluntary consent could have been clearly erroneous. The dissenting opinion of the Supreme Court of Florida properly found that the controlling question was whether a reasonable person in Bostick's position would have felt that he was free to terminate the encounter, and go about his business. Florida asserts that the answer to this question must be that a reasonable person would have felt that he had a choice of whether to talk with the officers or not. The test could be stated as whether a person would have been so intimidated by the police conduct that he felt compelled to answer the officer's questions. *See United States v. Tavolucci; United States v. Savage,* 889 F.2d 1113 (D.C. Cir. 1989). Bostick would not have had to leave the bus to terminate the conversation. He merely had to say no when

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5 Indeed, one of the companion cases to *Bostick* resulted in a finding by the trial court that a seizure had resulted. This ruling was overturned by the district court, and reinstated by the Supreme Court of Florida. *State v. Avery; Avery v. State.*

the officers asked him for consent to search his bag. Had Bostick declined the conversation, the officers would have moved on, or faced certain application of the exclusionary rule. The totality of the circumstances do not suggest coercion, and the denial of the motion to suppress by the trial court and the implicit factual findings made thereby that the consent was voluntary, should have been given due deference by the Supreme Court of Florida.

CONCLUSION

For the foregoing reasons, the decision of the Supreme Court of Florida should be reversed, and this cause remanded to the Florida courts for further proceedings.

Respectfully submitted,

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QUESTION PRESENTED

Whether two police officers violated the Fourth Amendment when, as a routine practice unprovoked by any suspicion, they boarded an interstate bus during a scheduled stop and, while the door to the bus was closed and one officer carried a pistol in his hand and partially blocked the aisle, questioned respondent and obtained permission to search his luggage.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases Page

TABLE OF AUTHORITIES—Continued

Page

Miscellaneous

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. 89-1717

STATE OF FLORIDA,

Petitioner

v.

TERRANCE BOSTICK,

Respondent

On Writ of Certiorari to the Supreme Court of Florida

BRIEF OF RESPONDENT

STATEMENT

On the morning of August 27, 1985, Detective Joseph Nutt and Officer Steven Rubino, wearing green "raid jackets" bearing the name and insignia of the Broward County Sheriff's Department, boarded a Greyhound bus at the bus station in Fort Lauderdale, Florida. J.A. 9. The bus was making a brief scheduled stop to pick up passengers and freight before continuing on its Miami-to-Atlanta route. J.A. 54. Detective Nutt was the first one to board the bus, carrying in his hand a zippered pouch containing a pistol. J.A. 14, 28. Officer Rubino followed, with his firearm concealed in his waistband. J.A. 22, 28. When the officers boarded the bus, the bus driver left

the vehicle and closed the door behind him. J.A. 53-54, 57, 62.[1]

Without asking permission from the bus driver or making any general announcement to the bus passengers, the officers proceeded directly to the back of the bus, where respondent Terrance Bostick was lying on the rear seat with his head on a red tote bag.[2] J.A. 10-11, 28, 35.

[1] As confirmed in a telephone conversation with counsel for petitioner, petitioner does not dispute that the bus driver left the bus, closing the door behind him, immediately following the boarding by the officers, and that the door remained closed until he reboarded some time later, during or after the search of the blue bag. These facts are clear from the deposition of the driver, George A. Black, J.A. 51, 53-54, 57, which was filed with the trial court following the suppression hearing. That deposition is contained in the trial court case file, with the handwritten notation on the cover, "filed in open court 6/11/86." While the record in the Florida appellate and Supreme courts contains a transcript of neither the trial court proceedings on June 11, 1986 nor the Black deposition itself, it does contain Bostick's Supplemental Memorandum to the trial court, summarizing the relevant aspects of the driver's deposition, which is described in the memorandum as having been "submitted in evidence." J.A. 61-63. The State does not dispute that this Court may treat the deposition as part of the record.

[2] As noted in the Amicus Brief of the United States at 10 n.2, the trial court's reliance on a form order denying the motion to suppress, J.A. 2, leaves doubt as to the factual assumptions underlying the ruling. In particular, there is no way to determine with certainty the trial judge's view as to whether Bostick was awakened by the officers or otherwise touched by them, whether the officers asked if Bostick had "a minute" to talk before requesting his driver's license and bus ticket, whether Detective Nutt had his gun pouch open and his hand on his gun, where Officer Rubino was standing during the exchange, and whether Bostick was advised of his right to refuse to consent to the search of his blue bag.

Bostick testified that he "was sleeping" when he "felt someone touching [him] on [his] feet," at which time Detective Nutt asked him if he had a bus ticket and identification. J.A. 35-36, 41. Detective Nutt, in contrast, stated that Bostick "was leaning over in a comfortable position. He wasn't sleeping because I introduced myself and he responded back to me." J.A. 15. Officer Rubino described Bostick as "[l]eaning on an elbow half sitting and half lying . . . I don't remember him sleeping." J.A. 28-29. On three of the four occasions when the officers described the initial contact with Bostick, they did not mention any preliminary question as to whether Bostick had time to talk with them. J.A. 10, 11-12, 30. On one occasion, during cross-examination, Nutt said that, as he displayed his own credentials, he asked Bostick if he had "a minute to speak with us." J.A. 15.

As to the gun carried by Detective Nutt, the officers stated that it was carried in a small black pouch in Nutt's hand. J.A. 9, 14, 28. Bostick stated further that during part of the encounter Nutt had his hand on the gun, inside the unzipped pouch. J.A. 41. Nutt testified that he usually kept the pouch zipped, acknowledging, firearm." J.A. 15. He could not recall whether he had had his hand though, that there "have been many times I had a hand on the directly on the weapon in this instance. J.A. 14-15. *See* J.A. 28.

The two officers offered conflicting accounts of Officer Rubino's position during the confrontation with Bostick. According to Detective Nutt, Officer Rubino was standing "[b]ehind me further toward the front of the bus." J.A. 10. However, Officer Rubino stated that he stood "off the aisle in front of the seat" immediately ahead of Bostick's seat, and that Detective Nutt stood next to him, half in front of the seat and half in the aisle. J.A. 22, 31.

As to the issue of whether Bostick was told he need not consent to a search of his bag, the officers described the sequence of events concerning that search a total of five times. On four of those occasions, they made no mention of any such statement. J.A. 10, 23-24, 29, 33. On one other occasion, during cross-examination, Detective Nutt testified that he told Bostick prior to the search of the blue bag that he had a right to refuse to consent. J.A. 20. Bostick denied that such a statement was made at any time. J.A. 37. The Florida Supreme Court rephrased the question presented so as to eliminate the premise that Bostick was advised of his right to refuse consent. Pet. App. 41.

Respondent submits that affirmance of the decision below is required on the limited facts set out in the decision of the Florida Supreme Court, Pet. App. A2, without resolution of those issues on which the record is controverted. However, in the event that the Court should find the unresolved facts to be potentially dispositive, respondent submits that the writ of certiorari should be dismissed as improvidently granted, on the ground that the record is not

The pouch in Detective Nutt's hand was recognizable as containing a pistol, Pet. App. A2, and Bostick was aware

of the gun when he was first approached. J.A. 37-38, 47-48. The record does not indicate that either officer ever informed Bostick that he did not have to answer their questions. The officers had no reasonable suspicion of criminal activity by anyone on the bus. J.A. 13, 26.

Detective Nutt stationed himself in front of Bostick's seat, in a manner that partially blocked the aisle, with Officer Rubino located nearby. J.A. 10, 22, 31. *See supra* note 2. After displaying his Sheriff's Department badge and identification, Detective Nutt asked Bostick's destination. J.A. 10. Bostick replied that he was traveling to Atlanta. J.A. 10. Detective Nutt then requested his bus ticket and identification, which Bostick promptly handed to Nutt for his perusal. J.A. 10. Nothing about Bostick's ticket or driver's license gave the officers any reason to suspect him of wrongdoing, and the documents were returned. J.A. 17.

Detective Nutt then asked Bostick whether the red tote bag, which he was using as a pillow, could be searched for drugs. J.A. 10. After looking for approval to another passenger, to whom the bag belonged, Bostick handed the bag to Nutt, who searched it without finding any contraband. J.A. 10, 37. Detective Nutt then asked for and received Bostick's permission to search a blue bag that Officer Rubino had found on the overhead rack. Pet. App. A2; J.A. 10, 19-20, 23-24.[3] This search yielded a quantity of cocaine. J.A. 10.

"sufficiently clear and specific to permit decision of the important constitutional questions involved in this case." *Massachusetts v. Painten*, 389 U.S. 560, 561 (1968).

[3] Bostick testified that he did not consent to the search. J.A. 44. As stated by the Florida Supreme Court, Pet. App. A2, however, this factual issue was necessarily resolved against him in the trial court's order denying the motion to suppress. While the circumstances surrounding any such consent raise serious questions as to its voluntariness, *see infra* note 24, respondent does not here challenge the conclusion that a verbal consent was given.

The officers then placed Bostick under arrest and removed him from the bus. J.A. 10-11. As a result of the encounter and arrest, the bus was delayed more than twenty minutes in leaving Fort Lauderdale. J.A. 56, 58, 62.

Bostick was charged with trafficking in cocaine in violation of Florida law. He moved to suppress the cocaine found in the blue bag on the ground, *inter alia*, that his purported consent to the search of the bag was "the result of coercion and the intimidating circumstances surrounding the bus boarding." J.A. 3.

The trial judge conducted a hearing on the suppression motion on March 24, 1986. After listening to the testimony of the two police officers and Bostick, the judge withheld his ruling, but commented that the officers' testimony that Bostick voluntarily agreed to the search "does really stretch the imagination when they're standing there in an aisle and talking to someone and just checking all the bags. It's very intimidating even if there is consent." J.A. 49.[4]

On August 4, 1986, the trial judge issued a one-sentence order summarily denying the motion to suppress. J.A. 2. He issued no findings of fact or conclusions of

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[4] As noted in the Amicus Brief of the United States at 4, the trial judge also stated that "the police do have a right—and I guess you and I would, too—we can step on a bus and walk up and talk to somebody and say, can we check your bag. I don't know if that's contrary to any law, is it?" It is doubtful whether this statement can fairly be treated as the basis of the judge's decision denying suppression, since it was made in the course of the argument of the motion, more than four months before the decision was rendered, and suggests by its own terms that the judge had not yet finally resolved the issue in his own mind. Moreover, the statement was made in conjunction with the judge's observations about the intimidating circumstances facing Bostick. In any event, the stated conclusion is a legal rather than a factual one, and is closely related to the ultimate issue of law in this case—whether a seizure took place. *See* Amicus Brief of the United States at 10 n.2.

law in support of the order. Bostick pleaded *nolo contendere* to the cocaine charge, preserving his right to appeal the denial of the suppression motion. *See* Fla. R. App. P. 9.140(b) (West 1990).

A divided panel of the Florida Court of Appeal for the Fourth District affirmed without opinion. Pet. App. B1. The dissenting judge declared that he was "uncomfortable" with the search of Bostick's bag, which he found irreconcilable with this Court's decision in *Florida v. Royer*, 460 U.S. 491 (1983). Pet. App. B3. On petition for rehearing, the Court of Appeal certified to the Florida Supreme Court the question whether the search of Bostick's bag was permissible. Pet. App. B1-B2.[5]

The Florida Supreme Court reversed. Pet. App. A1. After modifying the question presented to omit the premise that Bostick was advised of his right to refuse consent,[6] the court held that the police officers had illegally detained Bostick prior to the search of his luggage, because a reasonable person would not have felt " 'free to disregard the questions and walk away' " in such circumstances. Pet. App. A8. (quoting *United States v. Mendenhall*, 446 U.S. 544, 554 (1980) (opinion of Stewart, J.)). In support of this conclusion, the court emphasized that the officers had worn identifying clothing; that Nutt appeared to be carrying a gun and stood in a position partially blocking

[5] The specific question certified by the Court of Appeal (Pet. App. B1-B2) was:

> May the police without articulable suspicion board a bus and ask at random, for, and receive consent to search a passenger's luggage where they advise the passenger that he has the right to refuse consent to search?

[6] The rephrased question considered by the Florida Supreme Court (Pet. App. A1) was:

> Does an impermissible seizure result when police mount a drug search on buses during scheduled stops and question boarded passengers without articulable reasons for doing so, thereby obtaining consent to search the passenger's luggage?

the aisle; and that Bostick "could not leave the bus" given its imminent departure for Atlanta and therefore had "only the confines of the bus in which to move about." Pet. App. A8. The court went on to conclude that Bostick's subsequent consent to the search of his luggage did not overcome the taint of the illegal detention. Pet. App. A9.

The three dissenting justices, while voting to uphold the trial court's ruling, also expressed "a certain amount of discomfort in the prospect of the police routinely boarding stopped buses to inquire of the passengers whether they will consent to a search of their luggage." Pet. App. A13. However, the dissenters would have deferred to the trial judge's apparent decision that the consent to search was voluntarily given in the circumstances of this case. Pet. App. 12, 15.

SUMMARY OF ARGUMENT

An individual is "seized" within the meaning of the Fourth Amendment whenever a police officer, "by means of physical force or show of authority, has in some way restrained [his] liberty." *Terry v. Ohio*, 392 U.S. 1, 20 n.16 (1968). In assessing whether a particular individual's liberty has been restricted in an encounter with the police, the Court inquires whether, in view of all of the surrounding circumstances, "a reasonable person would have believed he was not free to leave if he had not responded" to the officer's inquiries. *INS v. Delgado*, 466 U.S. 210, 216 (1984); *see also Florida v. Royer*, 460 U.S. 491, 502 (1983) (plurality opinion); *id.* at 511-12 (opinion of Brennan, J.).

A reasonable passenger would not have felt free to leave the Greyhound bus in Fort Lauderdale after having been confronted by the two police officers. The officers made a visible "show of authority" as they entered the bus, wearing "raid jackets," flashing badges, and carrying what appeared to be (and, in fact, was) a gun. They

made no announcement of the routine character of their inquiries, nor did they inform the passengers that they were free to leave or to decline to answer any questions. Indeed, the passengers would have received just the opposite impression from the bus driver's closing the door of the bus following the entrance of the officers.

The bus was supposed to be making only a brief stop before traveling on to Atlanta. Any passenger who left the bus would therefore risk being stranded in an unfamiliar city, possibly without baggage that might remain locked away in the luggage compartment. He would also have attracted the scrutiny of the police, as well as his fellow passengers, had he engaged in conduct so contrary to his apparent self-interest.

Nor could a passenger have distanced himself from the officers while remaining on the bus. A bus is a small, confined space that affords passengers little room in which to move about. A passenger could not have attempted to do so without attracting the officers' attention. Moreover, the officers at least partially blocked the aisle, standing between Bostick and the closed door of the bus. A reasonable person who found himself in such a small, enclosed area, confronted by two police officers, would not have felt free to walk away and terminate the interview. *See Florida v. Royer*, 460 U.S. at 502-03. Bostick was therefore seized within the meaning of the Fourth Amendment.

The State of Florida and *amicus curiae* United States do not dispute that the officers had no reason to suspect Bostick of any wrongdoing until after the search of his blue bag. Nor do they attempt to justify the officers' actions on the basis of a special law-enforcement necessity that outweighs the intrusiveness of the detention they entail. It therefore follows that Bostick was unreasonably seized in violation of the Fourth Amendment.

Assuming that Bostick was illegally seized, the cocaine found during the search of his bag must be suppressed as

"fruit of the poisonous tree." The State and the United States do not contest that conclusion. There was no intervening "independent act of free will," *Florida v. Royer*, 460 U.S. at 501, that even arguably separated Bostick's seizure from his consent to the search. The connection between these two events therefore cannot be considered " 'so attenuated as to dissipate the taint' " of the illegal detention. *Wong Sun v. United States*, 371 U.S. 471, 491 (1963) (quoting *Nardone v. United States*, 308 U.S. 338, 341 (1939)).

ARGUMENT

I. THE OFFICERS' CONDUCT CONSTITUTED AN UNREASONABLE SEIZURE OF BOSTICK WITHIN THE MEANING OF THE FOURTH AMENDMENT

This case presents a particularly aggravated instance of a scenario that has unfolded with increasing frequency in recent years: the boarding of buses by armed law-enforcement officers to question and search the persons and possessions of passengers as to whom they have no pre-existing information or reasons for suspicion. This practice is highly intrusive, especially on the particular facts before the Court, because it is likely to instill in travelers the sense that they have no reasonable option but to acquiesce in the officers' requests. Under the circumstances here present, the confrontation constituted a seizure, which was unreasonable because not predicated on any articulable suspicion or any plausible basis in law-enforcement necessity or practice.

A. Bostick Was Seized Because a Reasonable Person in His Position Would Not Have Felt Free to Terminate the Encounter and Walk Away

If the Fourth Amendment is to protect that most basic of individual rights—the "right to be let alone," *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)—its prohibition against unreasonable seizures must reach not only the obvious, but also the

more subtle ways that one can be intentionally confined by law-enforcement action. In its "totality of the circumstances" approach to identifying seizures, *see United States v. Mendenhall*, 446 U.S. 544, 557 (1980) (opinion of Stewart, J.); *Schneckloth v. Bustamonte*, 412 U.S. 218, 227 (1973), this Court has recognized that liberty may be constrained by official displays of authority lacking either a direct and unambiguous physical restraint or a verbal directive explicitly curtailing liberty. The test is not whether the police have expressly effected an arrest or detention, either by word or deed, but whether "a reasonable person would have believed he was not free to leave." *INS v. Delgado*, 466 U.S. at 216; *see also Florida v. Royer*, 460 U.S. at 502 (plurality opinion); *id.* at 511-512 (opinion of Brennan, J.); *United States v. Mendenhall*, 446 U.S. at 554 (1980) (opinion of Stewart, J.).

Even apart from the aggravated circumstances of this case, the basic police practice of boarding buses in midjourney to engage in ad hoc questioning of previously unidentified and unsuspected persons may be highly coercive.[7] While officers may approach an individual on the street and ask if he is willing to answer some questions, *Florida v. Rodriguez*, 469 U.S. 1, 5-6 (1984); *Dunaway v. New York*, 442 U.S. 200, 210 n.12 (1979), when

[7] Faced with situations often much less compelling than those presented here, numerous judges have struck down bus encounters absent pre-existing grounds for suspicion, on the basis that a reasonable person would not feel "free to leave" when confronted by police officers within the confines of a bus. *See, e.g., United States v. Madison*, 744 F. Supp. 490, 496 (S.D.N.Y. 1990); *United States v. Chandler*, 744 F. Supp. 333, 335-36 (D.D.C. 1990); *United States v. Alston*, 742 F. Supp. 13, 15-16 (D.D.C. 1990); *United States v. Felder*, 732 F. Supp. 204, 207-08 (D.D.C. 1990); *United States v. Cothran*, 729 F. Supp. 153, 155-56 (D.D.C. 1990), *rev'd*, No. 90-3034, slip op. (D.C. Cir. Dec. 21, 1990); *United States v. Lewis*, 728 F. Supp. 784, 786-87 (D.D.C. 1990), *rev'd*, No. 90-3029, slip op. (D.C. Cir. Dec. 21, 1990); *People v. Camacho*, N.Y. Law J., Sept. 7, 1990, at 18, col. 3; *see also United States v. Grant*, 734 F. Supp. 797, 802 (E.D. Mich. 1990) (seizure on airplane).

carried out within the confines of a bus at an intermediate stopping point, this practice has the quality of a dragnet. Travelers may feel compelled to cooperate with the police, even if they might rather not, in order to avoid the risk of unhappy consequences.

The approach will often be made in a city unfamiliar to the passenger, usually a city where, because it is an intermediate stop on his journey, he had not intended presently to spend time. Especially for those of limited financial resources or limited education, many of whom use buses as a means of long-distance transportation,[8] leaving the bus to escape the officers' presence is likely to be at best a disfavored option.[9] It may also, on other

[8] *See* L. Cunningham & K. Thompson, *The Intercity Bus Tour Market*, J. Travel Res., Fall 1986, at 8 ("Research studies . . . have concluded that intercity bus ridership consists basically of either those less than 24 years of age or those over 65. Ridership typically includes a disproportionate number of low-income individuals."); *see also* J. Bolt, *Greyhound Takes to Radio for Summer Ad Campaign*, Associated Press, May 3, 1990 (available on NEXUS) ("Greyhound says its passengers tend to be students or from low-income families").

[9] A number of lower federal courts have recognized that a reasonable bus passenger would be particularly reluctant to walk away from an encounter with the police at an intermediate point in his journey, thereby risking "being stranded in a city which he had no intention of visiting and in some cases missing the opportunity to take a bus to his intended destination." *United States v. Madison*, 744 F. Supp. at 496; *see United States v. Grant*, 734 F. Supp. at 802. The United States urges the Court to disregard such arguments because "[t]o the extent that a reasonable person would not have felt free to leave the bus, that was not because of the officers' conduct, but because the bus was soon to depart." Amicus Brief of the United States at 20-21.

The United States ignores the fact that the officers purposefully chose to question persons who were already seated on a bus that was about to depart—as opposed, for example, to persons who were waiting in bus stations or disembarking from buses—presumably because they knew that such persons would be constrained by time and money, among other concerns, from walking away from the encounter. The confining effect of police conduct is to be evaluated

grounds, reasonably appear to be impractical or even impossible. For example, a person's luggage may be stored away in the baggage compartment, or the bus driver may have taken his ticket, thus eliminating the option of taking a different bus.[10] Or the exit from the bus may be blocked by people or a closed door, or departure may appear to be inconsistent with the intentions of the inquiring officer.

Further, while a person's mere refusal to respond to police inquiries cannot "without more" provide reasonable suspicion of wrongdoing, *Florida v. Royer*, 460 U.S. at 498, a person's engaging in actions contrary to his own apparent self-interest (*e.g.*, leaving an inter-city bus whose departure is imminent) might provide some or all of the objective basis necessary for an investigative detention.[11] A reasonable person could thus conclude that

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not in a context isolated from the actions and concerns of those acted upon, but in the actual context reasonably foreseeable to the officer. Thus, for example, police conduct in erecting a concealed barricade in the road to stop a fleeing thief may be actionable as an unreasonable seizure, even though it was the thief's predictable action of driving into it that resulted in his "seizure" and death. *Brower v. County of Inyo*, 109 S. Ct. 1378 (1989).

[10] The passenger's situation would thus be similar to that of a person whose ticket had been retained by the police. *See Florida v. Royer*, 460 U.S. at 501, 503-04 & n.9. If the passenger attempted to retrieve his ticket or checked luggage from the bus driver--assuming that the driver remained with the bus, which he did not in this case--the police might deem such conduct to warrant further scrutiny.

[11] Indeed, even a passenger who does nothing more than refuse to talk to the police while remaining on the bus may invite renewed police overtures at later stops along the route. *See United States v. Felder*, 732 F. Supp. at 205 (officer testified that "when passengers who appear nervous refuse to consent to an interview, certain members of his unit then take it upon themselves to notify authorities at the next stop"); *United States v. Cothran*, 729 F. Supp. at 156 (officer testified that, when passengers refused to permit a search of their luggage, he would sometimes notify authorities at the next stop to subject the passengers to further scrutiny).

some response to police inquiries will ultimately be necessary, regardless of whether he initially agrees to talk or seeks to avoid the encounter. In that sense, the bus context differs from confrontations on the street, *Michigan v. Chesternut*, 108 S. Ct. 1975 (1988), in an airport concourse, *United States v. Mendenhall*, 446 U.S. 544, or in a factory, *INS v. Delgado*, 466 U.S. 210, where "the location provided ample opportunities for the individuals to leave the presence of the officers without engaging in an act which would be contrary to their interests or raise a reasonable suspicion." *United States v. Madison*, 744 F. Supp. 490, 494 (S.D.N.Y. 1990).

The close confines of a bus present a factor of major importance, because passengers are afforded little room to move about and no effective way to escape the attentions that the officers may direct their way. The bus setting thus contrasts sharply with the workplace setting in *INS v. Delgado*, 466 U.S. at 213, where the Court noted that employees were free to walk around the entire factory to avoid the INS agents.[12] A bus is more reminiscent of the small, confined office in which the subject was detained in *Florida v. Royer*, 460 U.S. at 502.

These circumstances, which are typically present in inter-city bus boardings, are aggravated by additional facts present here that would clearly have discouraged a reasonable person from attempting to leave or break off

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[12] The United States contends that the restrictive setting of a bus encounter cannot, without more, support a determination that an individual was not "free to leave" because the individual had already "voluntarily placed himself in that restrictive environment." Amicus Brief of the United States at 21 n.13 (citing *INS v. Delgado*, 466 U.S. at 218). The United States' argument entirely ignores the fact that the officers deliberately decided to act on this captive audience, presumably because they believed that their inquiries would be more fruitful if conducted in the restrictive confines of the bus rather than, for example, in the bus station. *See supra* note 9.

the encounter. The officers made a particularly visible show of official authority, *Terry v. Ohio*, 392 U.S. at 20 n.16, and of their ability to use force if necessary to control the situation. Detective Nutt carried a pistol, which was recognizable inside the pouch that he held in his hand. Pet. App. A2; J.A. 37-38, 47-48. *See United States v. Mendenhall*, 446 U.S. at 554 ("the display of a weapon by an officer" is one factor suggesting that a reasonable person might not have felt free to leave). Moreover, both officers wore not merely uniforms, but "raid jackets," which the television-viewing public has come to associate with police strikes on scenes of criminal activity. In contrast, the officers in *Royer* and *Mendenhall* wore plainclothes and carried no visible firearms. *See Florida v. Royer*, 460 U.S. at 493; *United States v. Mendenhall*, 446 U.S. at 555.[13]

And once the police officers approached Bostick in the rear of the bus, they stood between him and the exit,[14] thereby at least partially blocking his only route to the door of the bus. Bostick was thus " 'in a small enclosed area being confronted by two police officers—a situation which presents an almost classic definition of imprisonment.' " *Florida v. Royer*, 460 U.S. at 496 (quoting *Royer v. Florida*, 389 So.2d 1007, 1018 (Fla. App. 1980)).

[13] In recently reversing suppression orders in decisions of the District Court for the District of Columbia in *United States v. Cothran*, 729 F. Supp. 153 and *United States v. Lewis*, 728 F. Supp. 784, the District of Columbia Circuit distinguished those cases from this one on the ground that a reasonable bus passenger would not "find his 'business' impeded by the officers' questioning. The officers neither wore badges nor carried visible weapons. *Compare Bostick v. State*, 554 So.2d 1153, 1154, 1157 (Fla. 1989) . . . ." *United States v. Lewis*, No. 90-3029, slip op. at 10.

[14] It is undisputed that Detective Nutt was standing partially in the aisle in front of Bostick's seat. As noted above, *supra* note 2, the officers' testimony diverges as to whether Officer Rubino was standing in the aisle behind Detective Nutt or in front of the seat ahead of Bostick's seat. Both positions would discourage an attempted departure.

Indeed, the bus was made even more confining by the driver's closing its only door after the officers boarded. It is questionable whether a typical bus passenger would know how to operate such a door or would be likely to attempt to do so in the driver's absence. Any passenger who had wished to leave the bus during the officers' visit might therefore have had some difficulty doing so, even if he had gotten past the officers.

The police questioning here was not introduced by a statement that the procedure was routine and not based on any particular information. The questioning thus could be expected to cause a passenger concern or even alarm at the prospect that he or others on board were suspected of criminality. *See Michigan Dep't of State Police v. Sitz*, 110 S. Ct. 2481, 2486-87 (1990); *United States v. Martinez-Fuerte*, 428 U.S. 543, 558-59 (1976). Further, as in *Royer*, Bostick "was never informed that he was free to [depart] if he so chose." *Florida v. Royer*, 460 U.S. at 503; *see also id.* at 501.[15] The officers thus failed to take a simple precaution that, as this Court has previously indicated, "may have obviated any claim that the encounter was anything but a consensual matter from start to finish." *Id.* at 504; *cf. Schneckloth v. Bustamonte*, 412 U.S. at 227 (a person's "knowledge of the right to refuse consent is one factor to be taken into account" in determining whether his consent was voluntary).

The officers' conduct thus conveyed to the reasonable passenger—indeed, it appears to have been calculated to convey—the message that he would not necessarily be allowed "to disregard the questions and walk away." *United States v. Mendenhall*, 446 U.S. at 554.

[15] As this Court's *Royer* decision demonstrates, police officers do not indicate that an individual is free to depart merely by asking at the outset whether he will talk with them. In *Royer*, as here, the officers claimed to have initiated the encounter by inquiring whether the person "had a moment to talk." *Royer v. Florida*, 389 So.2d 1007, 1016 (Fla. App. 1980). *See supra* note 2.

Presumably recognizing the obstacles that would discourage a reasonable person from trying to leave a bus in these circumstances, the State and the United States suggest that the Court should undertake a totally new inquiry, focusing not on whether a reasonable person would have felt free to walk away but rather on whether he would have felt free to terminate the encounter while remaining on the bus.[16] Brief of Petitioner at 14-15; Amicus Brief of the United States at 22. This argument fails to recognize that, so long as the individual and the police remain in close proximity to each other within a confined space, the encounter cannot be considered truly over. And a reasonable person would not have felt free to simply stonewall the officers' inquiries, because the officers' conduct gave substantial reason for question about how the officers would respond.

A refusal to cooperate voluntarily might reasonably be viewed as likely to provoke continuing inquiries by the officers, resulting at least in significant embarrassment and perhaps culminating in forcible detention of either the individual or the entire bus. The officers gave no reason to believe that the entire bus would not be held, briefly or indefinitely, pending resolution of their curiosity. The officers' free rein on the bus, after boarding without securing the driver's consent, demonstrated their apparent authority to detain it, which by itself gave them substantial coercive power over the passengers.[17]

[16] The United States' suggestion that a passenger could have avoided the officers' scrutiny by secreting himself in the restroom, Amicus Brief of the United States at 18, is particularly specious. Because such conduct would clearly appear to be an effort to avoid police attention, and because the police are well aware that illicit drugs are often disposed of by flushing them down toilets, an individual who remained in the restroom for a prolonged period would only be inviting closer police scrutiny.

[17] The United States suggests that the fact that the bus was due to depart soon rendered the encounter less coercive, because Bostick had the option of simply waiting out the officers and waving goodbye to them as the bus made its scheduled departure. Amicus Brief of the United States at 21. This might be a reasonable strategy if one could be sure that his wishes to be left alone would be respected and that the bus would not, on that account, be held up. It is not, however, a reasonable course for one in these circumstances to pursue, precisely because the officers' intentional conduct raises a serious question about what their response might be.

Even if neither the bus nor its passengers were further detained as a result of failure to cooperate, a traveler might expect to be the object of continued surveillance and questioning at future intermediate stops or at his final destination.

These appear to be real possibilities, not just to a person with an overactive imagination or a guilty conscience, but to anyone, *because of the way the police in this case conducted themselves.* The officers' show of authority, interrupting Bostick's rest with an unqualified request for information and documents, supported by a firearm visibly in hand, conveyed their determination to secure compliance. The close confines of the bus, the officers' physical interposition of themselves between Bostick and the exit, and the fact that the door was closed made the option of removing oneself from the encounter at best a highly speculative gauntlet that only a person with something to hide would even consider running.[18]

B. Bostick's Detention Was Unreasonable

A seizure violates the Fourth Amendment only if it is determined to be "unreasonable." The facts of this case strike a familiar chord with most Americans, not because they have personally experienced this scenario, but precisely because they have not. The image of police officers asking passengers for their "papers," and subjecting them to ad hoc inquiries, is one that we have been

[18] The officers' behavior on board the bus in creating a sense of confinement and constraint is not made less offensive by the fact that the coercive effect arises in part from the obvious preference of an inter-city bus passenger to stay on board the bus, if possible, until he reaches his destination. *See supra* note 9; Amicus Brief of the United States at 22.

fortunate to regard as an abhorrent creature of authoritarian regimes. *See* Pet. App. A11. These encounters are unreasonable, most fundamentally, because they do not fit with most Americans' sense of how they are supposed to be dealt with by their Government.[19]

More specifically, "the reasonableness standard usually requires, at a minimum, that the facts upon which an intrusion is based be capable of measurement against 'an objective standard,' whether this be probable cause or a less stringent test." *Delaware v. Prouse*, 440 U.S. 648, 654 (1979) (citations omitted). In the case of relatively brief investigative detentions of the sort presented here, the test recognized by this Court is whether the officer "has a reasonable suspicion supported by articulable facts that criminal activity 'may be afoot.'" *United States v. Sokolow*, 109 S. Ct. 1581, 1585 (1989) (citing *Terry v.*

[19] In addition to the numerous judges who have found such practices impermissible, *see supra* note 7, many of those who have found no constitutional offense have nonetheless noted their personal uneasiness with the practice. The trial judge in this case characterized bus encounters as "very intimidating," J.A. 49, and the three dissenting justices on the Florida Supreme Court "admit[ted] to a certain amount of discomfort in the prospect of the police routinely boarding stopped buses to inquire of the passengers whether they will consent to a search of their luggage." Pet. App. A13.

In *United States v. Fields*, 909 F.2d 470, 473 (11th Cir. 1990), the court stated that it was "disturbed" by the "thoughtful opinions" of other courts invalidating such practices, but was nonetheless obligated to follow Eleventh Circuit precedent. *See also United States v. Hammock*, 860 F.2d 390, 393 (11th Cir. 1988) (recognizing that "actions by law-enforcement officers that would not constitute an arrest in, for example, an airport environment, might constitute an arrest when used to interdict drug couriers traveling by bus because of the inherent limitations on a bus passenger's freedom of movement") (citations omitted).

Perhaps most telling of all is the amicus brief in this case by the Americans for Effective Law Enforcement ("AELE"), a pro-law-enforcement organization that has filed 85 previous briefs with this Court, all of them supporting the position of law enforcement. AELE comes forward here to support the ruling below that the police conduct constituted an unreasonable seizure of Bostick.

Ohio, 392 U.S. at 30). No such reasonable, articulable suspicion existed in this case prior to the officers' completion of their search of the blue bag. *See* Pet. App. A9; J.A. 13, 17; *see also* Amicus Brief of the United States at 10 ("the police officers had no reason to suspect that respondent was carrying illegal drugs"). The detention was therefore unreasonable under the objective standard articulated by this Court.

There can be no justification in these circumstances for allowing the detention of Bostick in the absence of reasonable suspicion. This is not an instance where, in the presence of a "special governmental need[], beyond the normal need for law-enforcement," an intrusion may be approved without any predicate of individualized suspicion, upon a balancing of "the individual's privacy expectations against the Government's interests." *National Treasury Employees Union v. Von Raab*, 109 S. Ct. 1384, 1390 (1989). To be sure, "the public has a compelling interest in identifying by all lawful means those who traffic in illicit drugs for personal profit." *Florida v. Royer*, 460 U.S. at 508 (Powell, J., concurring). But this interest does not justify subjecting individuals to suspicionless searches and seizures except in rare instances, and then only "pursuant to a plan embodying explicit, neutral limitations on the conduct of individual officers." *Brown v. Texas*, 443 U.S. 47, 51 (1979); *see Michigan Dep't of State Police v. Sitz*, 110 S. Ct. at 2487 (upholding highway sobriety checkpoint program where "checkpoints are selected pursuant to the guidelines, and uniformed police officers stop every approaching vehicle"); *National Treasury Employees Union v. Von Raab*, 109 S. Ct. at 1390 (upholding drug tests required of "every employee who seeks a transfer to a covered position" where "the permissible limits of such intrusions are defined narrowly and specifically").

The requirement that law-enforcement officers act in accordance with pre-existing standards is designed to prevent individuals from being subjected to detentions or

other intrusions "at the unbridled discretion of law-enforcement officials." *Delaware v. Prouse*, 440 U.S. at 661; *see also National Treasury Employees Union v. Von Raab*, 109 S. Ct. at 1390; *United States v. Brignoni-Ponce*, 422 U.S. 873, 882-83 (1975). The Court has recognized the "grave danger that such unreviewable discretion would be abused by some officers in the field." *United States v. Martinez-Fuerte*, 428 U.S. 543, 559 (1976) (citing *United States v. Brignoni-Ponce*, 422 U.S. at 882-83). To allow police officers to engage in random standardless searches and seizures "'would invite intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches.'" *Delaware v. Prouse*, 440 U.S. at 661 (quoting *Terry v. Ohio*, 392 U.S. at 22).

Further, the appearance that individual police officers are permitted to exercise such unbridled discretion may "generat[e] . . . concern or even fright on the part of lawful travelers." *United States v. Martinez-Fuerte*, 428 U.S. at 558; *see also United States v. Villamonte-Marquez*, 462 U.S. 579, 589 (1983) (awe); *Delaware v. Prouse*, 440 U.S. at 657 (anxiety); W. LaFave, *"Factualization" in Search and Seizure*, 85 Mich. L. Rev. 427, 448 (1986) (noting that a standardized-procedures rationale is most acceptable when the intrusion "(i) is not perceived by the individual affected or by others as accusatory in nature, and (ii) is not open to the possibility that it was either a consequence of arbitrary selection or the manifestation of some ulterior motive").

There is no evidence that Detective Nutt and Officer Rubino were acting pursuant to any plan or under the limitation of any guidelines or standards when they approached Bostick on the Greyhound bus.[20] For all that

[20] The State bears the ultimate burden of persuasion as to whether the evidence at issue was untainted by illegality. *Alderman v. United States*, 394 U.S. 165, 183 (1969); *see Florida v. Royer*, 460 U.S. at 500 (prosecution bore the burden of establishing that the detention was sufficiently limited in scope and duration to constitute an investigative seizure); *United States v. Mendenhall*, 446 U.S. at 557 (prosecution bore the burden of establishing that a reasonable person would have felt free to walk away from the encounter); *Brown v. Illinois*, 422 U.S. 590, 604 (1974) (prosecution bore the burden of establishing that evidence obtained after an illegal seizure was admissible).

appears from the record, the Sheriff's Department allowed officers in the field to exercise "unbridled discretion" in singling out passengers to be subjected to interrogation. Nor is there any indication that the Sheriff's Department imposed any restrictions on, for example, what the officers should say to the passengers, whether the officers should display their firearms, or where the officers should position themselves while conducting interviews.[21]

Further, it is apparent that the police can conduct "random citizen contacts," J.A. 13, with bus passengers without the element of detention and coercion present here. They could interview willing passengers before they board the bus or after they disembark at their destinations. Where passengers are asked by the bus company to disembark at intermediate points, the police could also conduct interviews with cooperating passengers outside the bus. In addition, the police could enlist the cooperation of the bus companies in conducting "canine sniffs" of passengers' baggage, or could install magnetometers at bus stations to detect the weapons that are frequently

[21] There are indications in the record that the Sheriff's Department has imposed some restrictions on officers "working the buses" since the seizure and subsequent arrest of Bostick. *See* Amicus Brief of Sheriff Nick Navarro (filed Oct. 14, 1987 in the Florida Supreme Court) at 4 (noting "substantial evolutionary changes in the procedure utilized by Broward County Deputies since the apprehension of Terrance Bostick"). These restrictions may have been in place prior to the events at issue in *United States v. Hanousek*, 800 F.2d at 391-92, which held that a bus encounter by members of the Sheriff's Department was not a seizure where, *inter alia*, the officers concealed their weapons and "remained slightly behind [the passenger's] seat so that the aisle was clear for him to leave the bus." *Id.* at 392.

carried by drug traffickers[22] and thereby discourage the use of inter-city buses to transport illegal drugs. And they could continue to board buses to detain persons whom they reasonably suspect to be drug couriers.[23] It can be no objection that these less intrusive alternatives may be less effective than the practice employed here because they lack the coercive twist of an armed on-board confrontation, for that is precisely the law-enforcement edge that the Fourth Amendment does not allow.

Accordingly, the practical restriction of Bostick's liberty while he was questioned on the bus must be deemed to have been unreasonable under the Fourth Amendment.

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[22] *See, e.g., United States v. Flowers*, 912 F.2d 707, 709 (4th Cir. 1990) (defendant's luggage contained a pistol and a large quantity of crack cocaine); *United States v. Cothran*, 729 F. Supp. at 155 (defendant's luggage contained a handgun and cocaine).

[23] Nor need the Court now exclude the possibility of police officers' ever boarding buses to interview passengers even without reasonable suspicion. There is no occasion here to determine whether it would be possible to implement a plan embodying explicit limitations on law-enforcement conduct designed to negate the coercive implications that might otherwise arise. Clearly, though, the absence of visible weapons, an announcement to passengers of the routine and voluntary nature of the encounter, the avoidance of physical contact, and other limitations could significantly alter the character of the interaction.

Further, none of this Court's decisions recognizing an array of lawful and effective means of detecting drug traffickers need or should be undermined by affirmance of the decision below. *See, e.g., Alabama v. White*, 110 S. Ct. 2412, 2417 (1990) (police may rely on anonymous informant's tips, as corroborated, to justify investigatory stop); *United States v. Sokolow*, 109 S. Ct. at 1587 (police may use "drug courier profiles" to attempt to identify drug traffickers); *United States v. Place*, 462 U.S. 697, 707 (1983) (police may conduct "canine sniffs" of baggage without reasonable suspicion); *Florida v. Royer*, 460 U.S. at 497 (police may approach any individual on the street, at an airport or in similar public places and "put questions to him if the person is willing to listen"); *see also* Amicus Brief of AELE at 10.

II. BOSTICK'S CONSENT TO SEARCH WAS TAINTED BY THE ILLEGALITY OF HIS DETENTION

A consent to search given during an illegal detention is ineffective if the consent was the result of the detention rather than "an independent act of free will." *Florida v. Royer*, 460 U.S. at 501, 507-08 (citing *Wong Sun v. United States*, 371 U.S. 471). In that instance, any evidence obtained in the course of the search must be suppressed as "fruit of the poisonous tree," regardless of whether the consent was voluntarily given.[24] *Id.* at 501; *Brown v. Illinois*, 422 U.S. 590, 602 (1974); *cf. Dunaway v. New York*, 442 U.S. at 217 (statements that are deemed voluntary under the Fifth Amendment although made during an illegal arrest must nonetheless be suppressed under the Fourth Amendment if obtained by exploitation of the illegality of the arrest). In assessing whether a statement made after an illegal detention is the product of "an independent act of free will," courts are to consider such factors as the "temporal proximity" of the two events and "the presence of intervening circumstances." *Brown v. Illinois*, 422 U.S. at 603.

Here, the police officers obtained Bostick's consent to the search of the blue bag in the course of an unreasonable seizure. The officers' foray onto the bus was a purposeful quest for evidence, with the coercive environment that they created as their principal tool. *See Dunaway v. New York*, 442 U.S. at 218. There were no intervening events—*e.g.*, a termination of the detention and the lapse of several hours or days, *see Wong Sun v. United States*, 371 U.S. at 491—separating Bostick's seizure from his consent to the search. The connection between

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[24] Respondent also maintains that the State failed to carry its burden of proving that any consent given by him was subjectively voluntary. *LoSi Sales, Inc. v. New York*, 442 U.S. 319, 329 (1979); *Schneckloth v. Bustamonte*, 412 U.S. at 233-34. By virtue of the circumstances that respondent contends amounted to a seizure, the consent was given in a highly coercive environment.

these two events therefore cannot be considered "'so attenuated as to dissipate the taint'" of the illegal detention. *Id.* at 491 (quoting *Nardone v. United States*, 308 U.S. at 341). Indeed, the State and the United States do not even argue that, if Bostick was subjected to an illegal detention, the cocaine found during the search of his bag does not have to be suppressed.

CONCLUSION

For the reasons set forth above, we submit that Bostick was seized when the police interrogated him on the bus; that the detention was unreasonable under the Fourth Amendment because it was not based on reasonable suspicion; and that Bostick's consent to the search of his luggage was tainted by the illegality of his detention. The judgment of the Florida Supreme Court should therefore be affirmed.

Respectfully submitted,

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December 21, 1990

(3)

No. 89-1717

In the Supreme Court of the United States

OCTOBER TERM, 1990

STATE OF FLORIDA, PETITIONER

v.

TERRANCE BOSTICK

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether two police officers violated the Fourth Amendment when they boarded an interstate bus during a scheduled stop and, without particularized suspicion but also without any coercion or show of force, asked respondent questions and obtained permission to search his luggage.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 89-1717

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ON WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES

Federal law enforcement officers routinely approach individuals to ask questions, either because they suspect the individuals may be engaged in criminal activity or because they hope the individuals may be able to assist them in investigations of others. In the course of such encounters, the officers sometimes seek permission to examine the individuals' clothing or luggage. In such cases, the question frequently arises whether a seizure has occurred at any point in the encounter. The Court's disposition of this case may help answer that question in some of the typical settings in which it arises.

More specifically, the federal government has brought a number of prosecutions resulting from consent searches similar to the one in this case. Some of those prosecutions have resulted in rulings upholding the practice, see *United States* v. *Flowers*, 912 F.2d 707 (4th Cir. 1990); *United States* v. *Hammock*, 860 F.2d 390 (11th Cir. 1988), while others are still in litigation, see *e.g.*, *United States* v. *Lewis*, No. 90-3029 (D.C. Cir.) (appeal pending); *United States* v. *Madison*, No. 90-1545 (2d Cir.) (appeal pending). This case will affect those pending cases and will provide direction for federal officers who participate in drug surveillance programs at airports, train stations, and bus depots. This case will also affect federal prosecutions in which evidence was obtained by local police engaging in similar police-citizen encounters.

STATEMENT

1. Respondent Terrance Bostick boarded a Greyhound bus in Miami on the morning of August 27, 1985. He was bound for Atlanta. J.A. 8, 33. When the bus made a scheduled stop in Fort Lauderdale, two Broward County police officers, Joseph Nutt and Steven Rubino, got on the bus. J.A. 26. They were dressed in plain clothes, but wore windbreakers with Sheriff's Department insignia on them. J.A. 8, 21. One officer had concealed his weapon completely, while the other officer carried his weapon in a black, hand-held pouch. J.A. 13, 21, 36-37. At a suppression hearing, the officers testified that they regularly boarded buses in Fort Lauderdale and sought permission to search for drugs. J.A. 12, 29. They had no particular reason to suspect that respondent or anyone else on the bus was carrying illegal drugs. J.A. 12.

Pursuant to their standard procedure, the two officers walked to the back of the bus. They planned to talk first to passengers in the rear of the bus and then, as time permitted, to work their way toward the front of the bus. J.A. 31. The officers first approached respondent, who was stretched across three seats at the very back of the bus, resting on a red bag. Officer Nutt showed respondent his badge and, in a conversational tone, asked if respondent had a minute to speak to them. J.A. 8-10, 23, 43. Respondent agreed to do so and, upon request, showed Officer Nutt his ticket to Atlanta and his Florida driver's license. J.A. 9, 15, 29. Officer Nutt returned the ticket and the license and then asked if he could search respondent's bags for drugs. Respondent gave him the red bag and Officer Nutt looked through it but did not find any drugs. Officer Rubino then asked respondent if a blue suitcase in the overhead rack was his. Respondent said that it was, and Officer Nutt asked if he could search it. J.A. 9-10, 15-16. Officer Nutt told respondent he had the right to refuse to give his consent to the search, but respondent said, "Go ahead." J.A. 19. Officer Nutt then searched the suitcase and found a large quantity of cocaine inside it. Respondent was then arrested. J.A. 9-10.[1]

The trial court denied respondent's motion to suppress the cocaine. J.A. 1. Although the court wrote

[1] Respondent admitted that he gave Officer Nutt permission to search the red bag, which actually belonged to another passenger on the bus. J.A. 35-36. Respondent testified, however, that when he was asked for permission to search the blue suitcase, he "didn't quote anything." J.A. 36. He added that he had been arrested in the past and that, based on what he had learned from those experiences, he would never voluntarily consent to the search of a bag that contained drugs. J.A. 37.

no opinion and made no express findings of fact, the court noted that the record contained "sworn testimony from two police officers" and stated that "you have to go along with the sworn testimony." J.A. 48. The court added that "the police do have a right * * * the police can step on a bus and walk up and talk to somebody and say, can we check your bag[?]". *Ibid.* Respondent then pleaded guilty to trafficking in cocaine and was sentenced to five years' imprisonment. R. 106.

The district court of appeal affirmed without opinion, with one judge dissenting. Pet. App. B1-B6. On rehearing, however, the court certified the following question to the Florida Supreme Court: "May the police without articulable suspicion board a bus and ask at random, for, and receive, consent to search a passenger's luggage where they advise the passenger that he has the right to refuse consent to search?" *Id.* at B1-B2.

2. The Florida Supreme Court rephrased the question to read: "Does an impermissible seizure result when police mount a drug search on buses during scheduled stops and question boarded passengers without articulable reasons for doing so, thereby obtaining consent to search the passenger's luggage?" Pet. App. A1. By a four-to-three vote, the court "answer[ed] the certified question in the affirmative" and reversed. *Id.* at A1-A15. The court accepted and quoted from the statement of facts as recited in the dissenting opinion in the district court of appeal. *Id.* at A2. The quoted portion of that opinion noted that there was "a conflict in the evidence about whether [respondent] consented to the search of the second bag in which the contraband was found and whether he was informed of his right to

refuse consent," but ruled that "any conflict must be resolved in favor of the state, it being a question of fact decided by the trial judge." *Id.* at A2, B3.

On the merits of the Fourth Amendment issue, the court acknowledged that "neither the state nor federal constitutions are offended when agents of the state approach an individual on the street or in another public place, ask questions without intimidation, and offer the *voluntary* answers to those questions into evidence in a criminal prosecution." *Id.* at A6 (emphasis in original). The court did not, however, accept the State's argument that what preceded respondent's arrest "was a consensual encounter meeting all the criteria for voluntariness prescribed under *Schneckloth* v. *Bustamonte*, 412 U.S. 218 (1973)." Pet. App. A6. Instead, the court concluded "first, that [respondent] in fact was 'seized' by the officers and, second, that any consent he gave to search his luggage was not free from the taint of the illegal detention." *Id.* at A7.

In support of those conclusions, the court noted that it had "no doubt that the Sheriff's Department's standard procedure of 'working the buses' is an investigative practice implicating the protections against unreasonable seizures of the person." Pet. App. A7. The court then stated that, under this Court's decisions in *Michigan* v. *Chesternut*, 486 U.S. 567 (1988), and *United States* v. *Mendenhall*, 446 U.S. 544 (1980), the question whether respondent had been seized within the meaning of the Fourth Amendment depended on whether "a reasonable traveler would not have felt that he was 'free to leave' or that he was 'free to disregard the questions and walk away.'" Pet. App. A8. Noting that respondent "could not leave the bus, which was soon to depart" and that

"the officers partially blocked the aisle and * * * one appeared to carry a gun," the court held that respondent had been seized. *Ibid.* Since the officers conceded that they "lacked any basis for suspecting illegal activity," *id.* at A9, and since even a temporary seizure must be justified by reasonable suspicion, see *United States* v. *Sokolow*, 109 S. Ct. 1581, 1585 (1989), the court held that respondent's detention was "unlawful and unjustified," Pet. App. A9. The court added that respondent's "subsequent consent to search his luggage" did not "overc[o]me the taint of the illegal police conduct" because there had been no clear break in the chain of events leading from the seizure to the consent. *Id.* at A9-A10.

The dissenters stated that "the controlling question is whether a reasonable person would have felt free to terminate the encounter, given the totality of the circumstances." Pet. App. A13 (Grimes, J., dissenting). They stated that in their view the police may board a bus with the permission of the operator and ask questions of anyone who is willing to listen. *Id.* at A14. While the dissenters conceded that under some circumstances the police might so intimidate a passenger that a subsequent search could not be deemed consensual, they saw no basis in this case to overturn the trial court's finding "that the consent to search had been voluntarily given." *Id.* at A15 (Grimes, J., dissenting); see also *id.* at A12 (McDonald, J., dissenting).

SUMMARY OF ARGUMENT

Law enforcement officers do not violate the Fourth Amendment by initiating consensual encounters. "Only when the officer, by means of physical force or show of authority, has in some way restrained the

liberty of a citizen may we conclude that a 'seizure' has occurred." *Terry* v. *Ohio*, 392 U.S. 1, 19 n.16 (1968). In a series of cases arising at airports, this Court has made clear that even if officers lack any suspicion of a particular individual, they may generally ask questions of that individual, ask to examine his identification, and request consent to search his luggage, as long as they do not suggest that compliance with their requests is required. The test the Court has used to distinguish a seizure from a consensual encounter is whether "in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *Michigan* v. *Chesternut*, 486 U.S. 567, 573 (1988) (quoting *United States* v. *Mendenhall*, 446 U.S. 544, 554 (1980) (opinion of Stewart, J.)).

Under those principles, it is clear that the police officers' encounter with respondent would have been entirely lawful if the encounter had occurred in the lobby of the bus station. The record in this case shows that the officers spoke in conversational tones, did not display their weapons, and did not restrain respondent in any way or otherwise suggest that compliance with their requests was required. In the absence of any indication that respondent was not free to choose whether to cooperate with the officers, he was not seized merely because the officers asked him some questions. Moreover, the officers advised respondent that he could refuse to allow them to search his suitcase. In those circumstances, the trial court was correct in concluding that respondent's will had not been overborne and that his consent was voluntary.

The Florida Supreme Court based its decision principally on its conclusion that a reasonable person in

respondent's position would not think that he was "free to leave," because he "had only the confines of the bus to move about." Pet. App. A8. That proposition is legally flawed. First, the officers did not restrain respondent and compel him to remain in his seat where they could talk with him. Nothing in the version of the facts accepted by the Florida Supreme Court suggests that the officers used physical force or a show of authority to coerce respondent into speaking with them and consenting to the search of his luggage. Second, the bus was about to leave Fort Lauderdale with respondent aboard; respondent knew that if the officers did not take some action to remove him from the bus, he would shortly be on his way to his destination. Respondent's position was therefore not even as difficult as that of a person who is approached by police in an airport terminal. That person must walk away from the police to terminate the encounter. All respondent had to do was stay in his seat, decline to talk with the officers, and wait for the bus to depart.

In any event, the Florida Supreme Court misapplied this Court's test for distinguishing between encounters and seizures by erroneously focusing on the question whether a person in respondent's position, who wished to continue his journey, would have felt "free to leave" the bus. Leaving the bus was not the only way respondent could have declined to cooperate with the officers; he could simply have told them he did not wish to speak with them or that he did not wish to consent to a search of his luggage, as they had advised him he could. In this setting, then, the court's focus should have been on whether a reasonable person would think that he could terminate the conversation. And on that issue, the dissenting judges below were correct. Nothing about the facts

of this case—including the fact that respondent was sitting on a bus—would have caused a reasonable person to believe that he could not say no to the officers' requests.

In holding that respondent had been seized, the Florida Supreme Court relied in part on the fact that the encounter in this case was part of the Sheriff's Department's regular practice of "working the buses." Pet. App. A7. There is, however, no legal basis for the proposition that a police-citizen encounter that occurs as a result of happenstance or an officer's on-the-spot decision is not a seizure, but that the same encounter is transformed into a seizure if it takes place pursuant to a regular police practice.

There is no validity to the "police state" specter raised by the Florida Supreme Court. The officers could not insist that respondent or anyone else on the bus cooperate with them, although the passengers were free to cooperate if they chose. Moreover, law enforcement officers may not even suggest in cases such as this that compliance with their requests is mandatory, nor may they use the fact of noncompliance to justify a seizure. Therefore, to say that the Fourth Amendment is not implicated in this case does not give the police license to engage in intimidating and coercive practices that will invade the privacy of unwilling citizens.

ARGUMENT

THE POLICE OFFICERS DID NOT SEIZE RESPONDENT BY ASKING HIM QUESTIONS AND OBTAINING PERMISSION TO SEARCH HIS LUGGAGE

Because the police officers had no reason to suspect that respondent was carrying illegal drugs, they would not have been justified in demanding that he respond to their questions or submit to a search. But the police made no such demands in this case, either explicitly or implicitly. To the contrary, they merely approached respondent, asked him some questions, and sought permission to search his luggage. In those circumstances, a reasonable person would have felt free either to decline to speak to the officers or to consent to a search. Accordingly, the Fourth Amendment was not violated by this consensual encounter.[2]

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[2] Analysis of this case is complicated by the failure of the trial court to make findings of fact. The trial court appears to have credited the testimony of the two police officers, see J.A. 48, and the two appellate courts accepted the State's version of the facts bearing on whether respondent consented to the search and whether the officers advised respondent of his right to refuse consent, see Pet. App. A2, B6. The state courts, however, did not expressly resolve other factual questions that bear on the issue before the Court. To be sure, the ultimate question whether a seizure took place is an issue of law. See *United States* v. *Mendenhall*, 446 U.S. 544, 554-555 (1980) (opinion of Stewart, J.) (describing circumstances in the absence of which "otherwise inoffensive contact between a member of the public and the police cannot, as a matter of law, amount to a seizure of that person"); *United States* v. *Maragh*, 894 F.2d 415, 417-418 (D.C. Cir. 1990). But the resolution of that issue will often turn on factual questions on which the trial court's findings are entitled to great deference. We have specifically noted those factual issues not expressly resolved by the state courts, and we have relied on evidence on those issues only where it is uncontradicted.

A. Law Enforcement Officers Do Not Need Reasonable Suspicion To Ask Questions And To Seek Permission To Conduct A Search

1. In *Terry* v. *Ohio*, 392 U.S. 1, 19 n.16 (1968), the Court noted that "not all personal intercourse between policemen and citizens involves 'seizures' of persons. Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred." Thus, the Fourth Amendment is not implicated by consensual encounters.

Under the Fourth Amendment, a law enforcement officer must have a "reasonable suspicion" that a person was engaged in wrongdoing in order to stop him and require him to respond to questioning. *Terry* v. *Ohio*, 392 U.S. at 27; *United States* v. *Sokolow*, 109 S. Ct. 1581, 1585 (1989). And for an arrest, the Fourth Amendment requires that an officer have probable cause to believe that the person committed a crime. *Terry*, 392 U.S. at 26. But there is "nothing in the Constitution which prevents a policeman from addressing questions to anyone on the streets." *Terry*, 392 U.S. at 34 (White, J., concurring). On the contrary, "law enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions, by putting questions to him if the person is willing to listen, or by offering in evidence in a criminal prosecution his voluntary answers to such questions." *Florida* v. *Royer*, 460 U.S. 491, 497 (1983) (plurality opinion).

This Court has addressed a number of situations presenting the question whether—and, if so, when—a defendant has been seized during a discussion with law enforcement officers. The test developed by this

Court to distinguish seizures from consensual encounters is whether "in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *Michigan* v. *Chesternut*, 486 U.S. 567, 573 (1988) (quoting *United States* v. *Mendenhall*, 446 U.S. 544, 554 (1980) (opinion of Stewart, J.)). Thus, a seizure occurs at the point that a reasonable person would think that he was not free to terminate a conversation and go about his business.

This Court has on three occasions addressed the question whether a police-citizen encounter at an airport constituted a "seizure" for Fourth Amendment purposes. In *United States* v. *Mendenhall*, *supra*, two justices concluded that the defendant had not been seized when two DEA agents approached her, inspected her ticket and identification, returned them, and obtained her permission to accompany them to the airport DEA office, where she allowed them to search her luggage. 446 U.S. at 555 (opinion of Stewart, J.).[3]

In *Florida* v. *Royer*, *supra*, the Court concluded that an encounter that began like the encounter in *Mendenhall* escalated into a seizure when two detectives retained the defendant's ticket and identification, informed him that they suspected him of transporting narcotics, and asked him to accompany them to a room the size of a large storage closet, where they searched his luggage. 460 U.S. at 494, 503

[3] Justice Rehnquist joined Justice Stewart's opinion. Three other justices noted that they did not necessarily disagree with Justice Stewart's conclusion that no seizure had occurred, but they found it unnecessary to reach the issue because they concluded that the agents had reasonable suspicion to stop the defendant. 446 U.S. at 560 & n.1 (Powell, J., concurring).

(plurality opinion). But a majority of the Court agreed that approaching the defendant and "[a]sking for and examining [his] ticket were no doubt permissible in themselves." *Id.* at 501; see *id.* at 523 n.3 (Rehnquist, J., dissenting) ("I also agree with the plurality's intimation that when the detectives first approached and questioned Royer, no seizure occurred and thus the constitutional safeguards of the Fourth Amendment were not invoked.").

In *Florida* v. *Rodriguez*, 469 U.S. 1 (1984), the Court confirmed that police who approach a person in an airport may ask questions of the person without intruding on an interest protected by the Fourth Amendment. The Court held that "[t]he initial contact between the officers and respondent, where they simply asked if he would step aside and talk with them, was clearly the sort of consensual encounter that implicates no Fourth Amendment interest." 469 U.S. at 5-6.[4]

These three "airport" cases have shed considerable light on the kinds of circumstances that may convert an encounter into a seizure. Certain circumstances "might indicate a seizure, even where the person did not attempt to leave [such as] the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled." 446 U.S. at 554 (opinion of Stewart, J.); see *United States* v *Sokolow*, 109 S. Ct. at 1584-

[4] In addition to *Mendenhall*, *Royer*, and *Rodriguez*, the Court has decided three other "airport encounter" cases, *United States* v. *Sokolow*, *supra*, *United States* v. *Place*, 462 U.S. 696 (1983), and *Reid* v. *Georgia*, 448 U.S. 438 (1980), but in none of those cases did the Court discuss the question whether a seizure occurred.

1585 (where DEA agents "grabbed respondent by the arm and moved him back onto the sidewalk," the Court assumed that a seizure had occurred); *United States* v. *Lee*, No. 89-1608 (2d Cir. Oct. 17, 1990), slip op. 6972. On the other hand, "[i]n the absence of some such evidence, otherwise inoffensive contact between a member of the public and the police cannot, as a matter of law, amount to a seizure of the person." 446 U.S. at 555 (opinion of Stewart, J.); *Florida* v. *Rodriguez*, *supra*.

2. The fact that a defendant acts unwisely in consenting to a search does not mean that he was seized prior to the search. In *Mendenhall*, Justice Stewart "reject[ed] the argument that the only inference to be drawn from the fact that the respondent acted in a manner so contrary to her self-interest is that she was compelled to answer the agents' questions." 446 U.S. at 555. No member of the Court has disagreed with that conclusion. To the contrary, in *Florida* v. *Royer*, 460 U.S. at 519 n.4 (dissenting opinion), Justice Blackmun noted that "[t]he fact that Royer knew the search was likely to turn up contraband is of course irrelevant; the potential intrusiveness of the officers' conduct must be judged from the viewpoint of an innocent person in Royer's position."

Thus, as Professor LaFave has stated, the police, "without having later to justify their conduct by articulating a certain degree of suspicion, should be allowed 'to seek cooperation, even where this may involve inconvenience or embarrassment for the citizen, and even though many citizens will defer to this authority of the police because they believe—in some vague way—that they should.'" 3 W. LaFave, *Search and Seizure* § 9.2(h), at 411 (1987 ed.) (quoting Model Code of Pre-Arraignment Procedure 258

(1975)).[5] That conclusion flows naturally from the rule that "a search conducted pursuant to a valid consent is constitutionally permissible" and the fact that "the community has a real interest in encouraging consent, for the resulting search may yield necessary evidence for the solution and prosecution of crime." *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 222, 243 (1973). Since "[a] person placed in official custody is not thereby rendered incapable of giving his free and voluntary consent to a warrantless search" (*United States* v. *Moreno*, 897 F.2d 26, 33 (2d Cir.), cert. denied, 110 S. Ct. 3250 (1990)), there is no reason why a person who is merely approached by law enforcement officers cannot do so.

To be sure, a police request for permission to search luggage puts a drug courier in a difficult position. An innocent person is likely to consent to a request by the police, at least if the request is not unduly burdensome or humiliating. See *INS* v. *Delgado*, 466 U.S. 210, 216 (1984). A drug courier is therefore likely to "'cooperate' in the hopes of simulating the reasonable innocent person and thereby shaking the police." *United States* v. *Tavolacci*, 895 F.2d 1423, 1424 (D.C. Cir. 1990). But the fact that the simulation does not throw the police off does not vitiate the voluntariness of the consent. Consent that is given

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[5] The District of Columbia Circuit made the same point in *Gomez* v. *Turner*, 672 F.2d 134, 142 (1982):

> Because a variety of factors may contribute to a person's decision to acquiesce to an officer's request, we are unwilling to impute to the reasonable person, as his sole motivation, a fear of official sanction engendered by the mere presence of an authority figure. * * * There must be some additional conduct by the officer to overcome the presumption that a reasonable person is willing to cooperate with a law enforcement officer.

foolishly may nevertheless be given freely. What matters is whether, in light of all the circumstances, the defendant's "will has been overborne and his capacity for self-determination critically impaired." *Schneckloth* v. *Bustamonte*, 412 U.S. at 225, 226.[6]

B. The Police Officers Did Not Seize Respondent By Questioning Him On A Bus

1. It is clear that the fruits of the search in this case would be admissible if the encounter had occurred in the lobby of the Greyhound station rather than on the bus itself. See *Florida* v. *Royer*, 460 U.S. at 505 ("had Royer consented to a search on the spot, the search could have been conducted with Royer present in the area where the bags were retrieved by Detective Johnson and any evidence recovered would have been admissible against him") (plurality opinion); *United States* v. *Tavolacci*, 895 F.2d at 1425; *United States* v. *Winston*, 892 F.2d 112 (D.C. Cir. 1989); *United States* v. *Baskin*, 886 F.2d 383 (D.C. Cir. 1989). Questioning in the lobby would be permissible because this Court's decisions make clear that law enforcement officers are free to approach people and ask to speak with them. *Florida*

[6] In some cases, travelers who are asked for permission to search particular luggage deny that the luggage belongs to them. When no one else claims the luggage, it may be considered abandoned and the police may open it. For example, in *United States* v. *Flowers*, 912 F.2d 707 (4th Cir. 1990), a bus passenger denied ownership of the luggage on the bin over his head. When the police subsequently opened it, they found a large quantity of crack cocaine, a pistol, and the passenger's wallet. *Id.* at 709. See also *United States* v. *Lee*, slip op. 6968-6969; *United States* v. *Carrasquillo*, 877 F.2d 73, 75 (D.C. Cir. 1989).

v. *Rodriguez*, 469 U.S. at 5-6. Similarly, an officer may ask to inspect a passenger's ticket and identification, and no seizure occurs as long as the officer promptly returns the documents. *Florida* v. *Royer*, 460 U.S. at 503 (plurality opinion); *id.* at 523 n.3 (dissenting opinion). And there is no question that a person may consent to a search in the course of such an encounter. *United States* v. *Mendenhall*, 446 U.S. at 558-559; *Schneckloth* v. *Bustamonte*, 412 U.S. at 222.

The fact that the events in this case occurred aboard a bus does not change the constitutional analysis. Respondent was not confronted by the threatening presence of several officers speaking in commanding tones and blocking his exit or requiring him to move to an interview room. Instead, respondent was approached by two officers who spoke in conversational tones, who did not force him to move, and who stood in a manner that did not block his access to the aisle. J.A. 8-9, 11, 20-21, 23, 23-30, 39.[7] The officers

[7] The Florida Supreme Court stated that "Officer Nutt stood in a position that partially blocked the only possible exit from the bus." Pet. App. A8. That statement seems to acknowledge that respondent's path was not completely blocked, and the undisputed evidence at the suppression hearing was that the officers stood in a way that did not block respondent's path out of the bus. J.A. 11, 23, 39. Other court decisions indicate that the procedure followed by officers in Broward County is to stand slightly behind passengers so as not to block them from going to the front of the bus if they choose. See *United States* v. *Hammock*, 860 F.2d at 392 (Broward County officers "remained slightly behind appellant's seat so that the aisle was clear for him to leave the bus, if he should have wanted to do so"); *United States* v. *Rembert*, 694 F. Supp. 163, 169 (W.D.N.C. 1988) (North Carolina officers

did not display their weapons, and respondent testified that he never saw a gun. J.A. 39.[8] The only suggestion of any physical contact between the officers and respondent was respondent's statement that he had been sleeping and that Officer Nutt "tapped me * * * [and] asked me did I have a bus ticket." J.A. 40-41.[9] Respondent did not attempt to leave the bus, to leave his seat to go to the nearby bathroom, or to terminate the conversation, and the officers did nothing to suggest that he was not free to do any of those

trained by Broward County Sheriff's Department "positioned themselves in the aisle to the rear of Rembert's seat and did not block his access to the aisle"). Obviously, it is not possible to stand completely behind a person who, like respondent, is seated at the very rear of a bus.

[8] The Florida Supreme Court noted that respondent testified "that Officer Nutt had his hand in a black pouch that appeared to contain a gun." Pet. App. A8. Even if the court had credited respondent's testimony, that testimony reflects only that respondent suspected Officer Nutt was carrying a weapon. There is a significant difference between an officer's carrying a weapon and displaying it during an encounter. It is widely understood that law enforcement officers often carry weapons but seldom use them. It is only a show of authority or some other actual restraint that matters for Fourth Amendment purposes, not the mere potential for such a show of authority. *Terry* v. *Ohio*, 392 U.S. at 19 n.16; *United States* v. *Winston*, 892 F.2d at 115. Moreover, while Officer Nutt testified that it was possible that he had his hand in his bag, he also stated that his normal practice was to keep the bag zipped. J.A. 13-14. Officer Rubino confirmed that he had never seen Officer Nutt unzip his pouch or put his hand in it while questioning a person on a bus. J.A. 27.

[9] Officer Nutt's recollection was that respondent was merely resting, not sleeping, and that he responded when the officer introduced himself. J.A. 14. Officer Rubino also recalled that respondent had been resting, not sleeping. J.A. 27-28.

things.[10] J.A. 17, 23. Nor did the officers tell respondent that they suspected him of carrying drugs.[11]

The record also supports the trial court's conclusion that respondent voluntarily consented to the search. "Voluntariness is a question of fact to be determined from all the circumstances." *Schneckloth* v. *Bustamonte*, 412 U.S. at 248-249. In this case, the trial court credited the officers' testimony that respondent consented. J.A. 48. There is nothing in the record to suggest that respondent's "will ha[d] been overborne and his capacity for self-determination critically impaired." See *Schneckloth* v. *Bustamonte*, 412 U.S. at 225. On the contrary, Officer Nutt testified that he advised respondent that he had the right to refuse to give his consent to the search of the blue suitcase containing the cocaine, but that respondent

[10] In a deposition given in connection with the suppression motion, the bus driver testified that he closed the door and left the bus after the officers arrived. The driver explained that he routinely shut the bus door whenever he left the bus during a station stop so that unauthorized persons could not board the bus without a ticket. J.A. 52, 54. There was no suggestion in the record that a passenger who decided to leave could not simply reopen the door and walk off the bus.

[11] Such a statement, in combination with other factors, might contribute to a person's reasonable belief that he is not free to leave. See *Florida* v. *Royer*, 460 U.S. at 496 (plurality opinion); *United States* v. *Gonzales*, 842 F.2d 748, 752 (5th Cir. 1988). We do not believe, however, that such a statement, standing alone, is likely to have such an effect. See *United States* v. *Lee*, slip op. 6973 ("The only factor that might arguably be construed as an indication that Lee was not free to leave was Officer Niczyporowicz's statement that Lee was suspected of carrying contraband. However, we are unconvinced that this single statement transformed an otherwise consensual encounter into a fourth amendment seizure.").

consented in spite of that advice. J.A. 19.[12] While this Court has held that such advice is not required, *Schneckloth* v. *Bustamonte*, 412 U.S. at 227-234, it has recognized that "the subject's knowledge of a right to refuse is a factor to be taken into account" in determining the voluntariness of consent to a search, *id.* at 249; see also *United States* v. *Mendenhall*, 446 U.S. at 558-559.

2. The Florida Supreme Court concluded that respondent was seized because he was not "free to leave" the bus and escape the officers' presence. "Because respondent was enroute to Atlanta," the court wrote, "he could not leave the bus, which was soon to depart"; for that reason, the court concluded, respondent was seized because he "had only the confines of the bus to move about." Pet. App. A8.

As an initial matter, the fact that respondent could have moved from his seat showed that he was "free to leave." He could have told the officers that he did not want to talk to them and walked down the aisle or into the bathroom on the bus if he wished to distance himself from the officers. If the officers had blocked his way or otherwise prevented him from walking away from them, their conduct clearly would have constituted a seizure for Fourth Amendment purposes. But nothing about the officers' manner, as revealed by the evidence in this case, would have caused a reasonable person to think he was not free to leave. To the extent that a reasonable person would not have felt free to leave the bus, that was

[12] The officers advised respondent that they were narcotics agents and that their job was to "contact the traveling public and ask for permission to do a consent check of bags for drugs." J.A. 22.

not because of the officers' conduct, but because the bus was soon to depart.[13]

The fact that the bus was about to depart actually made the encounter in this case *less* coercive than it might otherwise have been. Since the bus was about to leave Fort Lauderdale with respondent aboard, he did not have to take any action in order to continue his journey without any further interference from the Fort Lauderdale police officers. Unlike a person in a bus or airline terminal who must take the affirmative step of walking away from police officers, respondent did not have to take any affirmative measures in order to be on his way.

For that reason, the Florida Supreme Court erred when it focused exclusively on whether respondent was "free to leave" rather than on the principle that those words were intended to capture. As the dissenters in that court recognized, determining whether a person reasonably feels free to leave is just one way of answering the more basic question, *i.e.*, "whether a reasonable person would have felt free to terminate

[13] To the extent that the setting of the encounter was restrictive, that factor alone is not enough to amount to coercion, particularly when the citizen has voluntarily placed himself in that restrictive environment. In *INS* v. *Delgado*, *supra*, the respondents argued that immigration officials positioned at the exits of a factory made the interviews of employees inside inherently coercive. This Court answered that argument by pointing out that "when people are at work their freedom to move about has been meaningfully restricted, not by the actions of law enforcement officials, but by the workers' voluntary obligations to their employers." 466 U.S. at 218. So here, where respondent was on the bus by his own choice, any restriction on his movement was due to his own desire to remain on the bus and go on with his journey, not to any action on the part of the police. *United States* v. *Flowers*, 912 F.2d at 711-712.

the encounter, given the totality of the circumstances." Pet. App. A13.

In any case in which the person is on the move when the encounter begins, it is sensible to inquire whether the person reasonably feels free to continue on his way by walking away from the officers. But when the person is seated and has no desire to leave, the degree of the person's freedom to leave is not necessarily the most appropriate measure of the coercive effect of the encounter. Leaving the bus was not the only way respondent could have expressed his unwillingness to cooperate with the officers, nor was it even the most natural way. He could simply have told them he did not wish to speak with them or to consent to a search of his luggage, as they had advised him he could. Indeed, it would normally be easier for a person just to tell the officers he did not want to talk to them than for him to get up and walk away.

Absent some basis for further investigative action, officers who encounter such a person must comply with the person's wishes. As the Fourth Circuit stated in another case arising from a bus encounter, "[i]n this context, freedom to leave means fundamentally the freedom to break off contact, in which case officers must, in the absence of objective justification, leave a passenger alone." *United States* v. *Flowers*, *supra*, 912 F.2d at 712.

3. The Florida Supreme Court stated that " 'working the buses' is an investigative practice implicating the protections against unreasonable seizures of the person" (Pet. App. A7). That observation suggests that the court believed respondent was "seized" either because the encounter with the officers did not occur by chance or because the officers had "seized" the entire bus. Neither point has any merit

in light of *INS* v. *Delgado*, *supra*. That case involved a "factory survey," during which a team of INS agents entered a workplace and "[m]oving systematically through the factory, * * * approached employees and, after identifying themselves, asked them from one to three questions relating to their citizenship." 466 U.S. at 212. Based on the answers, the agents would either move on or ask to see the employees' immigration papers. *Id.* at 213. The Court concluded that the plaintiffs had not been seized on account of the questioning, even though the questioning was conducted pursuant to a plan.[14]

In *Delgado*, the Court also rejected the argument that the entire factory and everyone in it had been seized by the "factory survey" operation, an argument based largely on the fact that INS agents were stationed by the factory doors. 466 U.S. at 217. In light of that holding, no credible argument can be made in this case that the bus was seized when Officers Nutt and Rubino entered it. The officers placed no guards by the exit, and the officers were careful not to block the aisle. J.A. 11, 21, 23. Pursuant to their standard procedure, they started questioning passengers at the rear of the bus. J.A. 31. Thus, any passenger other than respondent could have walked to the front of the bus without even passing the officers. As in *Delgado* (466 U.S. at 213), the passengers were all free to go about their business

[14] See also *United States* v. *Johnson*, 910 F.2d 1506, 1509 (7th Cir. 1990) ("Johnson argues this was a 'seizure' within the meaning of the Fourth Amendment because the police made a 'predetermination' to stop her based on her resemblance to the drug courier profile. * * * Of course the officers planned to speak with her because of the drug courier profile; nevertheless, their actions did not restrain her liberty in any way.").

on or off the bus while the officers talked to other passengers.[15]

The two federal courts of appeals that have considered bus encounters like the one in this case have held that such encounters are not so inherently coercive as to constitute Fourth Amendment seizures. See *United States* v. *Flowers*, 912 F.2d 707 (4th Cir. 1990); *United States* v. *Hammock*, 860 F.2d 390 (11th Cir. 1988).[16] Both courts recognized that the law enforcement officers who arrested the defendants in those cases routinely boarded buses and sought cooperation from passengers. *Flowers*, 912 F.2d at 710 (the arresting officer had "boarded approximately one hundred buses, resulting in fifteen seizures of bags containing illegal drugs"); *Hammock*, 860 F.2d at 391 ("[f]ollowing their usual procedure, the detectives went to the rear of the bus and began to work their way forward"). Those courts correctly held that the Fourth Amendment is not violated merely because law enforcement officers board a bus pursuant to an investigative program under which they would contact as many passengers as possible before the bus left.

4. Because law enforcement officers in this country must respect an individual's right to be left alone, the

[15] Nothing in the record suggests that the officers prevented the bus from departing. The driver was simply accommodating the officers, consistent with his normal practice. J.A. 52. The driver testified that the police check of the buses normally took five to ten minutes. J.A. 55.

[16] Other courts have upheld similar bus and train encounters. See *United States* v. *Tavolacci*, *supra* (train); *United States* v. *Carrasquillo*, *supra* (train); *United States* v. *Rembert*, 694 F. Supp. 163 (W.D.N.C. 1988) (bus); *State* v. *Turner*, 94 N.C. App. 584, 380 S.E.2d 619 (1989) (bus). Contra, *United States* v. *Lewis*, 728 F. Supp. 784 (D.D.C. 1990) (bus).

"police state" images invoked by the Florida Supreme Court (Pet. App. A11) miss the mark. As the Fourth Circuit recognized in the *Flowers* case, 912 F.2d at 712, "Flowers possessed at a minimum the right to refuse to speak with the officers, who in turn possess no right to detain citizens who decline to talk or otherwise identify themselves." 912 F.2d at 712. Moreover, it is clear that law enforcement officers may draw no inference justifying a search or seizure from a refusal to cooperate. That is, officers lacking legal justification to detain a person may not bootstrap noncompliance into justification for a detention, because in that event a citizen would in effect have no way of declining to participate in a "consensual" encounter with the police. See *INS* v. *Delgado*, 466 U.S. at 216-217; *United States* v. *Mendenhall*, 446 U.S. at 554, 556 (opinion of Stewart, J.). Indeed, law enforcement officers lacking the requisite justification may not even give the *impression* that they have the right to seize a person. As Justice Stewart stated in *United States* v. *Mendenhall*, 446 U.S. at 554, a seizure may be caused by "the use of language or tone of voice indicating that compliance with the officer's request might be compelled." When a consent to search emerges from a consensual encounter, the encounter must be truly consensual; the police must rely on the voluntary cooperation of the subject. In a police state, in contrast, law enforcement officers do not have to rely on voluntary cooperation at all.[17]

[17] In this connection, it should be noted that "the confines of the bus" (Pet. App. A8) discourage any police misconduct. That is because not only is the subject confined to the bus, but so are other passengers. Accordingly, there typically would be many possible witnesses to support a claim that law enforcement officers had spoken in commanding tones or

The test that originated in *United States* v. *Mendenhall* "allows officers to make inquiries as long as they don't throw their official weight around unduly." *United States* v. *Tavolacci*, 895 F.2d at 1425. As such, it is "a rather conventional application of the idea of reasonableness, the line actually drawn by the Fourth Amendment." *Ibid.* When "the person to whom questions are put remains free to disregard the questions and walk away" (*United States* v. *Mendenhall*, 446 U.S. at 554), it cannot be said that his freedom has been curtailed. The dissenting judges in the Florida Supreme Court properly concluded that, under that standard, respondent was not seized when the two police officers approached him on the bus and sought his voluntary cooperation.

CONCLUSION

The judgment of the Florida Supreme Court should be reversed.

Respectfully submitted.

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NOVEMBER 1990

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otherwise implied that compliance with their requests was mandatory.

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(4)

No. 89-1717

In The
Supreme Court of the United States
October Term, 1990

THE PEOPLE OF THE STATE OF FLORIDA,

Petitioner,

--against--

TERRANCE BOSTICK,

Respondent.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

MOTION TO FILE BRIEF AND BRIEF AMICUS CURIAE OF AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC., IN QUALIFIED SUPPORT OF AFFIRMANCE OF THE DECISION BELOW.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

No. 89-1717

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EFFECTIVE LAW ENFORCEMENT, INC.,
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OF THE DECISION BELOW.

MOTION OF AMICUS
CURIAE TO FILE BRIEF
PURSUANT TO RULE 37.4 OF THE
U.S. SUPREME COURT RULES

Americans for Effective Law Enforcement, Inc., moves this Court for leave to file the attached brief as *amicus curiae*, and declares as follows:

1. *Identity and Interest of Amicus Curiae.* The *amicus curiae* is described as follows:

Americans for Effective Law Enforcement, Inc. (AELE), as a national not-for-profit citizens organization, is interested in establishing a body of law making the police effort more effective, in a constitutional manner. It seeks to improve the operation of the police function to protect our citizens in their life, liberties, and property, within the framework of the various State and Federal Constitutions.

AELE sponsors law-related seminars for police executives, training supervisors, internal complaint investigators, and their legal counsel. **AELE** also publishes monthly law digests relating to police civil liability, jail and prison legal issues and private security law.

AELE has previously appeared as *amicus curiae* over eighty-five times in the Supreme Court of the United States and over thirty-eight times in other courts, including the Federal District Courts, the Circuit Courts of Appeal and various state courts, such as the Supreme Courts of California, Illinois, Missouri, and Ohio.

2. *Desirability of an Amicus Curiae Brief. Amicus* is a professional association representing the interests of law enforcement agencies at the state and local levels. Our constituency includes: (1) law enforcement officers and law enforcement administrators who are charged with the responsibility of conducting street stops for investigations within the bounds of the law, and (2) police legal advisors who, in their criminal jurisdiction capacity, are called upon to advise law enforcement officers and administrators in

connection with such matters and to prosecute cases involving evidence obtained thereby.

Because of the relationship with our constituency--including active law enforcement administrators and counsel --we possess direct knowledge of the impact of the ruling of the court below, and we wish to impart that knowledge to this Court. We respectfully ask this Court to consider this information in reaching its decision in this case.

3. *Reasons for Believing that Existing Briefs May Not Present All Issues.* **AELE** is a national organization, and its perspective is broad. This brief concentrates on policy issues, including the values served by the adoption of reasonable rules for guiding police conduct in the law of stops for investigation. Although Petitioner and Respondent are clearly represented by capable and diligent counsel, no single party can completely develop all relevant views of such issues as these.

4. *Avoidance of Duplication.* Counsel for *amicus curiae* has reviewed the opinion of the court below and the positions taken by respective counsel for the parties in an effort to avoid unnecessary duplication. It is believed that this brief presents vital policy issues involving the administration of law enforcement that are not otherwise raised by either party in this case.

5. *Consent of Parties or Requests Therefor.* Counsel has requested consent of the parties pursuant to Rule 37 of the U.S. Supreme Court Rules. This Motion is necessary because such consents have not been received as of the time of printing of the Brief. Should they be received thereafter, they will be filed with the Clerk of this Court with a request that this motion be withdrawn.

For these reasons, the *amicus curiae* requests that it be granted leave to file the attached *amicus curiae* brief.

Respectfully submitted,

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INTEREST OF AMICUS

Americans for Effective Law Enforcement, Inc. (AELE), as a national not-for-profit citizens organization, is interested in establishing a body of law making the police effort more effective, in a constitutional manner. It seeks to improve the operation of the police function to protect our citizens in their life, liberties, and property, within the framework of the various State and Federal Constitutions.

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ARGUMENT

I.

POLICE BOARDING OF A PASSENGER BUS AT A STOP-OVER WITHOUT PARTICULARIZED SUSPICION, AND ASKING PASSENGERS FOR PERMISSION TO SEARCH LUGGAGE, CONSTITUTED AN UNREASONABLE "SEIZURE" WITHIN THE MEANING OF THE FOURTH AMENDMENT. THE PASSENGER'S ENSUING CONSENT TO A SEARCH OF LUGGAGE WAS NOT FREE FROM THE TAINT OF THE ILLEGAL DETENTION, AND THE POLICE PROCEDURE, ALTHOUGH EFFECTIVE IN THIS

CASE, IS FAR REMOVED FROM WELL-ACCEPTED LAW ENFORCEMENT PRACTICES, AND IT CURRENTLY EXCEEDS WIDELY RECOGNIZED JUDICIAL PRECEDENT.

Amicus will not discuss at length the case law analysis of the parties in this case. Instead, we will concentrate upon policy issues raised by this case and our need as law enforcement administrators and concerned members of Society to ensure that law enforcement officers have sufficient guidance in the area of Fourth Amendment jurisprudence.

In this case the Supreme Court of Florida, *Bostick v. State*, 554 So.2d 1153 (1989), ruled that an impermissible seizure resulted when sheriff's officers, pursuant to departmental policy, launched a drug search of passengers on buses traveling from Miami, Florida, to Atlanta, Georgia. The search, during a scheduled stop, was accompanied by the questioning of passengers about drugs without particularized or reasonable suspicion for doing so. In many instances the police obtained the "consent" of passengers to search their luggage.

The respondent, hereinafter referred to as "defendant," was asked to display his ticket and identification when he was accosted while sitting in the bus. He did so and his papers were immediately returned to him when they appeared to be in order. He was then asked to consent to a search of his luggage which he did, and cocaine was found therein.

The court ruled that the passenger had been "seized" without reasonable suspicion. It found that when he was first approached by the officers, while seated in the rear of the bus with the officers blocking the aisle, whatever freedom to leave was only ephemeral at best under the rule of *United States v. Mendenhall*, 446 U.S. 544 (1980). His "consent" was ruled tainted by the illegal detention.

In *Terry v. Ohio*, 392 U.S. 1, 19 n.16 (1968), this Court ruled that "[o]nly when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred." This rule was further clarified in *United States v. Mendenhall, supra*, by the concurring Justices who stated that only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave would such person be seized for Fourth Amendment purposes.

Amicus finds no fault with the ruling of the court below that defendant was seized within the meaning of *Mendenhall*, and agree that this was no mere consensual encounter within the purview of *Florida v. Royer*, 460 U.S. 227 (1983). We likewise can find no facts in the record below that would constitute reasonable suspicion for the seizure within the purview of *Terry v. Ohio, supra*. As noted in the opinion below, "the state concedes that it lacked any basis for suspecting illegal activity whatsoever." 554 So.2d 1158 (Fla. 1989). We likewise have no quarrel with the court's conclusion that the defendant's subsequent "consent" was tainted, there being no apparent break in the chain of illegality sufficient to dissipate the taint of the illegal seizure.

Unlike the court below, however, *amicus* does not believe that "our inquiry is at an end." 554 So.2d 1158.

Amicus, with more than sixteen years of experience in police training and education, view the confrontation and search procedure used here as highly unusual, if not unique. Despite the fact that the procedure employed was successful in this case, few law enforcement agencies would seriously consider adopting a policy of planned intrusions onto

intercity buses and standardless solicitations of consent to search a person's baggage and personal effects.

We submit that if such techniques--which are undoubtedly successful in ferreting out some unspecified amount of drugs and thus removing such material from the street--are to be countenanced at all by this Court, there should be an objective, though minimal, finding of criminal activity before a mass detention of interstate or intrastate travelers is permitted.

While the suspicionless drug testing of public safety employees has been allowed by this Court, *Skinner v. Railway Labor Executives Assn.*, ___ U.S. ___, 109 S.Ct. 1402 (1989); *National Treasury Employees' Union v. von Raab*, ___ U.S. ___, 109 S.Ct. 1402 (1989), such was done on the basis of a compelling need to protect public safety, with no practical alternative to the governmental means employed. Much the same moved this Court to recently sanction the use of DUI roadblocks in *Michigan v. Sitz*, ___ U.S. ___, 110 S.Ct. 2481 (1990).

The rationale of these cases has not been extended to citizens at large merely because they are travelers, without any relationship to safety on board a common carrier; moreover, any such extension would be constitutionally invalid. Setting aside equal protection issues, it is difficult to imagine a scenario of police activities, as in the present case, upon a planeload of business class air passengers arriving at a busy air terminal after an interstate flight.

II.

WHENEVER A MASS DETENTION AND QUESTIONING OF TRAVELERS IS CONTEMPLATED, THERE MUST BE A REQUIREMENT OF AN OBJECTIVE (THOUGH MINIMAL) INDICIA OF CRIMINAL ACTIVITY. WE DO URGE THE COURT, HOWEVER, TO LEAVE UNDISTURBED ITS PRIOR HOLDINGS AFFIRMING THE USAGE OF (a) LEGITIMATE DRUG COURIER PROFILES; (b) CITIZEN DRUG DEALER TIPS, AND (c) OTHER LEGITIMATE DETENTIONS FOR INVESTIGATION AND QUESTIONING.

Whenever a mass detention and questioning of travelers is contemplated, there must be a requirement of an objective (though minimal) indicia of criminal activity. We do urge the Court, however, to leave undisturbed its prior holdings affirming the usage of (a) legitimate drug courier profiles, (b) citizen drug dealer tips, and (c) other legitimate detentions for investigation and questioning.

Because of the major epidemic of drug trafficking, with all its tragic consequences, law enforcement authorities may understandably approach the edges of the Fourth Amendment, and seek legal expansion of the situations where drug evidence may be seized. However, it is equally important that any extension of the Fourth Amendment must proceed in ways that protect our nation's citizens against the arbitrary and often abusive techniques employed in totalitarian societies.

Among police procedures that should be legally approved is the use of drug-sniffing dogs at public bus stations and truck stops where vehicles are temporarily parked. Such dog sniffs do not constitute a search under the Fourth Amendment, *United States v. Place*, 462 U.S. 696 (1983). This technique could provide a reasonable basis for the removal and detention of a specific suitcase or box until consent or a search warrant is obtained for opening it. We are concerned, however, that if the practices employed by the law enforcement officers in the present case are condoned, similar practices would eventually extend to schoolrooms, places of entertainment, offices and other workplaces.

Any extension of the strictures of the Fourth Amendment to permit the confrontation and consensual search of travelers outside of airports and border entry stations must be accompanied by a threshold requirement that law enforcement officers possess a minimal, but nevertheless articulable indicia of criminal conduct.

Regardless of whatever action the Court may take with respect to the ruling below, we ask that the Court *not* disturb its prior rulings that have sanctioned a wide-range of essential law enforcement activity in related areas. Specifically, we urge this Court to make clear that its ruling would not call into question the use by law enforcement agencies of drug courier profiles for investigative stops, *United States v. Sokolow*, __ U.S. __, 109 S.Ct. 1581 (1989), investigative stops based upon corroborated anonymous citizen reports of crime, *Alabama v. White*, ___ U.S. ___, 110 S.Ct. 2412 (1990), and the various aspects of investigative stops related to the safety of law enforcement officers, *Adams v. Williams*, 407 U.S. 143 (1972), and *Michigan v. Long*, 463 U.S. 1032 (1983). These activities are grounded upon the objective standard of articulable suspicion flowing from *Terry v. Ohio, supra*, and are sufficiently safeguarded by appropriate restraints upon officer discretion, ensuring their reasonableness as well as necessity for effective law enforcement. The instant case, we submit, is far removed from the facts and rationales of those cases, and should be disposed of in a manner limiting this Court's ruling to the facts of this case.

CONCLUSION

Amicus submit that the law enforcement activity involved in this case is not a prevalent practice in law enforcement agencies. If this Court affirms the decision of the court below, we respectfully urge that it not adversely affect the Court's earlier rulings in the above cited cases.

Respectfully submitted,

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No. 89-1717

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

STATE OF FLORIDA,

Petitioner,

—v.—

TERRANCE BOSTICK,

Respondent.

ON WRIT OF *CERTIORARI* TO
THE SUPREME COURT OF FLORIDA

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION, THE ACLU OF FLORIDA, NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, AND FLORIDA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Other Authorities

INTEREST OF *AMICI*

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with over 275,000 members dedicated to the principles of individual liberty embodied in the Bill of Rights. The ACLU of Florida is one of its statewide affiliates.

Since its founding 70 years ago, the ACLU has consistently opposed recurrent efforts to whittle away the traditional protections of the Fourth Amendment in the alleged pursuit of more effective law enforcement. The pressures generated by the war against drugs have once again brought that debate into sharp focus. This case involves the constitutionality of a bus interdiction program. In a larger sense, however, it involves the fundamental premise of the Fourth Amendment -- namely, the right of the people to be free from random searches and seizures by government officials. That right was essential to the framers and is essential to the basic organizational premises of the ACLU.

The National Association of Criminal Defense Lawyers, Inc. (NACDL) is a District of Columbia nonprofit corporation with a nationwide membership of more than 5,000 lawyers. NACDL was founded over 25 years ago to promote study and research in the field of criminal defense law, to disseminate and advance the knowledge of the law in the field of criminal defense practice, and to encourage the integrity, independence and expertise of criminal defense lawyers. The Florida Association of Criminal Defense Lawyers (FACDL) is a state affiliate of NACDL with a statewide membership consisting of hundreds of criminal defense attorneys.

Among NACDL's and FACDL's stated objectives is the promotion of the proper administration of justice. Consequently, NACDL and FACDL are concerned with

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3.

the protection of individual rights and the improvement of the criminal law, its practices and procedures. Those organizational goals are directly implicated in this case. In particular, NACDL and FACDL believe that the position taken by petitioner in this case cannot be accepted without seriously eroding the basic constitutional safeguards of the Fourth Amendment.

STATEMENT OF THE CASE

This case involves the search of a bus passenger's luggage without probable cause or reasonable suspicion. It was not a coincidental encounter. Rather, it was part of a deliberate and increasingly popular strategy adopted by police officers in Broward County and elsewhere.

As part of that strategy, the officers in this case boarded an interstate bus bound from Miami to Atlanta during a layover in Fort Lauderdale.[2] They were armed and wearing "raid jackets" that clearly identified them as law enforcement officers. The defendant was sitting in the back of the bus and had not done anything to arouse the officers' suspicion. Nevertheless, he was approached and asked to produce his ticket and identification. He complied with the request and it is undisputed that both his ticket and identification were in proper order. The police then asked for "permission" to search the defendant's bag. The officer who made this request was standing in the aisle. Believing he had no choice, defendant acceded to the search, which led to his eventual arrest.

Prior to trial, defendant moved to suppress the fruits of the search as a violation of the Fourth Amendment. The government's position, then and now, was that the defendant had "consented" to the search and

[2] The statement of facts set forth in this brief is adopted from the opinion of the Florida Supreme Court. *Florida v. Bostick*, 554 So.2d 1153 (1989).

thereby waived his Fourth Amendment rights. This contention was emphatically rejected by the Florida Supreme Court, which ruled that defendant had been "seized" for Fourth Amendment purposes and that any subsequent "consent" was tainted and invalid. In explaining the basis for its ruling, the Florida Supreme Court concluded:

> Under such circumstances a reasonable traveler would not have felt that he was "free to leave" or that he was "free to disregard the questions and walk away." There was, in fact, no place to which a reasonable traveler might leave and no place to which he or she might walk away. The fact that the officers partially blocked the aisle and that one appeared to carry a gun only underscore this conclusion . . . For all intent and purposes, Bostick was detained by the activities of Officers Nutt and Rubino. Although this did not rise to the level of an "arrest," it nevertheless constituted a lesser form of "seizure" of Bostick's person.

554 So.2d at 1157 (citations omitted).

SUMMARY OF ARGUMENT

The issue in this case is whether the Fourth Amendment permits police to board interstate buses with neither probable cause nor reasonable suspicion and then, having "seized" the bus passengers, attempt to elicit their "consent" to a search of their luggage. According to petitioner, any objections to this practice should be dis-

missed as trivial. In fact, it is petitioner's expansive view of police authority that threatens to trivialize the fundamental values of individual security and personal privacy embodied in the Fourth Amendment.

The question of whether a Fourth Amendment seizure has taken place turns on whether the average person would feel free to leave an encounter with the police. Here, the defendant was confronted by armed police officers wearing "raid jackets" who stood in the aisle of the bus and by their very presence blocked his only means of egress. Under the circumstances, it was hardly unreasonable for the defendant to believe that he had no choice but to remain where he was. His subsequent "consent" to the search of his luggage did not eliminate the taint of the illegal seizure. To the contrary, the "consent" was a direct product of the illegal seizure and thus null and void.

Based on these facts, the Florida Supreme Court properly ruled that the fruits of the search could not be introduced in evidence. This Court, however, can and should go further. In particular, *amici* urge this Court to adopt a prophylactic rule barring the sort of bus interdictions revealed by this record. This request rests on several considerations. First, bus interdictions are an increasingly common law enforcement strategy. Second, they affect large numbers of people, the vast majority of whom are entirely innocent of any wrongdoing. Third, they are inherently standardless and thereby permit, if not encourage, discriminatory law enforcement. Fourth, they are both ineffective and unnecessary.

Amici do not question the sincerity or legitimacy of Florida's desire to disrupt the flow of drugs within its borders. As this Court has often stressed, however, that goal must be accomplished through constitutional means. Even in a war against drugs, random attacks against civilians are forbidden. The decision below should, therefore, be affirmed.

ARGUMENT

THE INCREASINGLY COMMON POLICE STRATEGY OF DETAINING BUS PASSENGERS WITHOUT EITHER PROBABLE CAUSE OR REASONABLE SUSPICION CANNOT BE SUSTAINED UNDER THE FOURTH AMENDMENT

A. This Case Is Illustrative Of A Widespread Fourth Amendment Problem

The search and seizure in this case were not the result of an unanticipated street encounter. They were the intended result of a deliberate police strategy. Moreover, that strategy is not confined to Broward County, Florida. To the contrary, the practice of boarding interstate buses and searching their passengers without probable cause or reasonable suspicion is an increasingly common tactic of law enforcement agencies around the country. *See, e.g., United States v. Hammock*, 860 F.2d 390 (11th Cir. 1988); *United States v. Felder*, 732 F.Supp. 204 (D.D.C. 1990); *United States v. Lewis*, 728 F.Supp. 784 (D.D.C. 1990); *United States v. Rembert*, 694 F.Supp. 163 (W.D.N.Car. 1988); *State v. Avery*, 531 So.2d 182 (Fla. 4th DCA 1988)(*en banc*).

The basic pattern of all these searches, as described in the reported cases, is essentially the same. Officers working in groups of two or three board interstate buses while they are stopped en route to pick up and discharge passengers. They wear "raid jackets" whose insignia clearly mark them as police officers and they are armed, though the weapons are generally concealed. They board the buses very near the scheduled departure time, when passengers would risk missing their trips if they tried to leave the bus. They engage in confrontations with passengers, chosen at random, with no limits on the field officers' discretion. They stand in or partly in the narrow aisles, towering over the seated passengers. Making clear that they are part of a drug interdiction

team, the officers ask the chosen passengers their destinations, ask for tickets and identification, and request permission to search luggage. The precise language used in these confrontations varies. It is clear, however, that many passengers accede to these search requests because they feel that they have no other choice.

Because the passengers subject to this procedure are chosen at random, the vast majority will have nothing criminal to hide. Relying on this fact, the Solicitor General dismisses the significance of these searches, asserting that "[a]n innocent person is likely to consent to a request by the police, at least if the request is not unduly burdensome or humiliating." Brief for United States at 15. *Amici* respectfully submit that this self-serving assumption lacks any empirical basis in fact.[3] The Solicitor General's position also implicitly undervalues the important privacy interests at stake. The carry-on luggage of many passengers is likely to contain toiletries, undergarments, and other intimate items that are intensely private, though perfectly legal. The compelled exposure of such items to police gaze is not an insignificant intrusion. As Justice Steven has observed: "Unwanted attention from the local police need not be less discomforting simply because one's secrets are not the stuff of criminal prosecutions." *Michigan Dep't of State Police v. Sitz*, 496 U.S. ___, ___, 110 S.Ct. 2481, 2493 (1990)(Stevens, J., dissenting).

[3] There is substantial evidence that most encounters between citizens and identified police officers involve felt coercion. *See* Maclin, "The Decline of the Right of Locomotion: The Fourth Amendment On the Street," 75 Cornell L.Rev. 1258, 1301-03 (1990)(and sources cited therein). Commonsense suggests that the level of apprehension and perceived coercion is substantially higher for most people in the confined spaces of a bus. Moreover, even if some citizens might be willing to allow such searches, "[t]he Fourth Amendment . . . is designed to protect the more sensitive among us, provided only that their expectations be reasonable." Schulhofer, "On the Fourth Amendment Rights of the Law-Abiding Public," 1989 Sup.Ct.Rev. 87, 154.

The Fourth Amendment issues in this case cannot, therefore, be dismissed as trivial. They certainly do not seem or feel trivial to the bus passenger confronted by the looming presence of a police officer flashing a badge and possibly a weapon. Indeed, what the Florida Supreme Court aptly described as "the Sheriff's Department's standard procedure of 'working the buses,'" 554 So.2d at 1156, is closely analogous to the highway patrol practices that this Court condemned in *Delaware v. Prouse*, 440 U.S. 648 (1979).

The Court's language in *Prouse* is equally relevant here:

> To insist neither upon an appropriate factual basis for suspicion directed at a particular [passenger] nor upon some other substantial and objective standard or rule to govern the exercise of discretion "would invite intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches . . . ."

Id. at 661, *quoting Terry v. Ohio*, 392 U.S. 1, 22 (1968). It would, in addition, substitute "the petty tyranny of unregulated rummagers," Amsterdam, "Perspectives on the Fourth Amendment," 58 Minn.L.Rev. 349, 411 (1974), for the principled safeguards of the Fourth Amendment.

B. The Bus Interdiction Programs Typified By This Case Represent A "Seizure" For Fourth Amendment Purposes

The test of when a police-citizen confrontation is a "seizure" subject to Fourth Amendment limitations is now well settled. A person has been "seized" within the meaning of the Fourth Amendment if "the officer, by

means of physical force or show of authority, has in some way restrained the liberty of a citizen." *Terry v. Ohio*, 392 U.S. at 19 n.16. That judgment, in turn, depends on whether, "in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *Michigan v. Chesternut*, 486 U.S. 567, 573 (1988), *quoting United States v. Mendenhall*, 446 U.S. 544, 554 (1980)(opinion of Stewart, J.).

Ordinarily, the question is quite fact-specific, intended to "assess the coercive effect of police conduct, taken as a whole, rather than to focus on particular details of that conduct in isolation," *Mendenhall*, 446 U.S. at 573. The factors common to bus stops, however -- including the partial or complete blocking of the aisle, the imminent departure of the bus, and the inability of the ordinary person to ignore a known police officer who is directing questions at him or her -- are such that a reasonable passenger will not feel free to leave. Because those common factors create the felt coercion, all such confrontations are properly deemed seizures and subject to Fourth Amendment controls. Most crucially, the passenger is physically inhibited from leaving the bus. Even if that were not true, however, leaving the bus is not a realistic alternative for most passengers since it means abandoning one's scheduled travel plans. *See Florida v. Royer*, 460 U.S. 491, 501 (1983)(defendant "was effectively seized" when the police "retain[ed] his ticket and driver's license").

As this Court has recognized, "the setting in which the conduct occurs" is crucial to determining whether there has been a Fourth Amendment seizure. *Chesternut*, 486 U.S. at 573. The geography of a bus makes it entirely different from a street or an airport terminal.[4]

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[4] It is also radically different than the design of a factory. The ability (continued...)

Bus aisles are exceedingly narrow; one judge found that the aisles of a series 2000 Greyhound bus are only 14" wide. *United States v. Felder*, 732 F.Supp. at 207. Whether the officers stand directly in the aisle or, as in this case, partly in the aisle and partly in the seat, easy egress is impossible.[5] A seated passenger could not simply walk away, but "would have required the permission of each of the officers to squeeze past them in the narrow aisles," *United States v. Cothran*, 729 F.Supp. 153, 158 (D.D.C. 1990).[6] Twiggy, let alone an average police officer, could not stand in aisles 14" wide without trapping a seated passenger.

Even if a passenger on one of these buses felt free to ask the officer to step aside, the passenger still could

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[4] (...continued)
of workers to move freely about within the factory, relied upon by this Court to find no seizure in *INS v. Delgado*, 466 U.S. 210 (1984), has no parallel within the confines of the narrow aisles of a bus.

[5] In some cases, the officers apparently stood slightly behind the passenger. Nonetheless,

> [i]n such a contained area, the officers were only steps away from being able to prevent the defendant's departure. A passenger who may be seized from behind before reaching the bus' only exit is likely to feel equally as trapped as one whose path to the exit is blocked.

United States v. Alston, 742 F.Supp. 13, 16 (D.D.C. 1990). The key is the perception of the reasonable passenger subject to these interdiction procedures.

[6] A similar point was made by the court in *Felder*, 732 F.Supp. at 206:

> [B]ecause Det. Hanson was blocking his path to the aisle, [the defendant] would have been unable to exit the bus without coming into physical contact with the officer unless Det. Hanson had turned sideways to allow the defendant to pass through the narrow aisle.

See also Avery, 531 So.2d at 196 (Anstead, J., dissenting)("the narrow aisles . . . are automatically 'blocked' merely by the presence of a police officer").

not readily leave. Here, as in many of these bus interdictions, the bus driver got off the bus and closed the bus door. His purpose may have been to keep others from boarding without tickets; an effect, of which the officers were surely aware, is to inhibit the passengers aboard from leaving. J.A. 52, 54. As the court below recognized, "[t]here was, in fact, no place to which a reasonable traveler might leave and no place to which he or she might walk away." 554 So.2d at 1157.[7] And, of course, if a passenger has luggage stored in the undercompartment of the bus, withdrawing from the confrontation by leaving the bus may mean losing his or her luggage. *See United States v Cothran*, 729 F.Supp. at 155.

Constraints of time as well as space inhibit the confronted passengers from leaving. The police time their interdictions program so that they are on the bus until departure time or even beyond. Frequently, officers wait until the passengers have reboarded and the bus is otherwise ready to leave before they even begin the interdiction process. *See, e.g., Rembert*, 694 F.Supp. at 163; *Avery*, 531 So.2d at 189 (Glickstein, J., concurring). In this case (and inevitably in many others), the bus is in fact delayed by the process. J.A. 52, 58-59.[8]

> [T]he police officers' presence on board right up until the time that the bus is ready to depart . . . mak[es] the passenger less likely to view exit and reentry onto the bus to be a reasonable

[7] Neither Mr. Bostick nor any other passenger should be reduced to hiding in the bathroom (*see* Brief for United States at 18, 20), in order to avoid an unwanted "encounter" with the police.

[8] The delay of the bus and all its passengers by the government, based on no articulable justification, interferes with the public's right to travel, a right long recognized as fundamental. *United States v. Fields*, 909 F.2d 470, 474 n.2 (11th Cir. 1990). *See also Aptheker v. Sec'y of State*, 378 U.S. 500 (1964); *Edwards v. California*, 314 U.S. 160 (1941).

alternative.

Avery, 531 So.2d at 196 (Anstead, J., dissenting).[9] Ordinary passengers do not feel free to outwait the police by sitting silently until the bus departs, *see* Brief for United States at 21; instead, they are likely to believe that the bus will not depart until the police have finished their business, especially when the driver waits outside while the officers carry out the interdiction.

This Court has properly defined the test for when a police-citizen confrontation becomes a Fourth Amendment stop in terms of reasonably perceived freedom of movement. Under this test, the Fourth Amendment is triggered whenever the situation "would have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business." *Chesternut*, 486 U.S. at 569. That impression is surely conveyed, and intentionally conveyed, by the sort of bus interdiction program at issue in this case. It is not by accident that the interdiction takes place on the bus rather than on the platform or the waiting room. Numerous scientific studies confirm that cramped spaces make people anxious and thus readier to assent to the

[9] *See also United States v. Cothran*, 729 F.Supp. at 155. In reviewing an analogous airplane seizure, the Sixth Circuit recently wrote:

> Citizens approached in an airport concourse retain the freedom to walk away from the officers; [the defendant] was approached by the agents after boarding and had no place to go but to remain on the plane.

United States v. Grant, Nos. 90-1397, 1398 (6th Cir. Dec. 3, 1990) (LEXIS, Genfed library, CtApp file) at 22 (footnote omitted).

Admittedly, a passenger "who *needed* to leave the bus," *Rembert*, 694 F.Supp. at 174 (emphasis added), might have felt able to do so; constitutional rights are infringed, however, if police create a situation in which one does not feel free to go on one's way for good reasons, bad reasons, or no reason at all.

requests of others.[10] To ignore an officer is rude.[11] It invites suspicion.[12] In short, we can characterize much police-citizen interaction as "a mere encounter" only because of the key factor missing here: the option of leaving.

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[10] *See, e.g.*, Albas & Albas, "Meaning in Context: The Impact of Eye Contact and Perception of Threat on Proximity," 129(4) J.Soc. Psychology 525 (1989)(people seek to increase personal space in situations perceived as potentially threatening); Strube and Werner, "Interpersonal Distance and Personal Space: A Conceptual and Methodological Note," 6(3) J. Nonverbal Behav. 163 (1982)(subjects seeking to avoid control by others chose to stand further away than those seeking to control others).

[11] Because interstate buses are crowded, with little personal space and highly restricted options for moving away, many people will seek to preserve as much felt privacy as possible by avoiding interactions with strangers. (Note, for example, how people avoid sitting next to strangers until a bus or waiting room is so full that this is unavoidable.) The officers' conduct in these interdictions thus qualifies as a seizure under Professor LaFave's interpretation of the *Mendenhall* test:

> conduct which a reasonable man would view as threatening or offensive even if performed by a private citizen [including] such tactics as . . . blocking the path of the suspect and encircling the path of the suspect.

3 W. LaFave, *Search and Seizure* §9.2(h) at 413-14 (2d ed. 1987).

[12] Police become suspicious when someone refuses to answer. *See* Pilcher, "The Law and Practice of Field Interrogation," 58 J.Crim. Law, Criminology And Police Science 465, 470 (1967). Although the Solicitor General properly states that "law enforcement officers may draw no inference . . . from a refusal to cooperate," Brief for United States at 25, in at least two reported cases officers testified that a refusal to cooperate "might be [deemed] suspicious" and might cause police to notify authorities at the next stop of their suspicions. *Cothran*, 729 F.Supp. at 156; *see also Felder*, 732 F.Supp. at 205. Such suspicions may well be communicated to the citizen, increasing the pressure to cooperate. In addition, if bus interdictions are not held to be seizures, there would be no effective constitutional protection against the hazard of being confronted again and again and again, at each rest stop.

The bus interdiction programs, as generally carried out, substantially inhibit the average passenger's felt ability to withdraw from the confrontation or otherwise to avoid compliance.[13] Furthermore, we must measure the intrusiveness of the program against the reaction of the reasonable person likely to be in the situation. Even excluding those whom hindsight proves to have been guilty, "the fear and surprise engendered in law abiding [bus passengers]" makes this practice a seizure. *Cf. Sitz*, 110 S.Ct. at 2486. It "is an intimidating and coercive situation in and of itself." *State v. Carroll*, 510 So.2d 1133, 1134 (Fla. 4th DCA 1987)(Glickstein, J., concurring).

The extent of felt coercion is even greater when we realize that bus passengers are disproportionately poor and minority.[14] These are the groups most likely to feel that it is not safe to ignore a police request.[15] It is, per-

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[13] Though some elements of the interdiction programs, such as the imminent departure of the bus that keeps people from deboarding, are part of the situation and not directly caused by the police, all the elements appear to be part of the police program. Police, in an unfettered and -- the state asserts -- unreviewable discretion, *choose* the time and place of these interdictions. They have created a confrontation under confined conditions when they clearly had other options. They cannot ask this Court to treat confined, cramped conditions as merely a background fact when it is part of their chosen policy, designed "to increase the psychological coercion." *People v. Evans*, 556 N.Y.S.2d 794, 800 (Sup.Ct. 1990). *Cf. Brower v. County of Inyo*, 489 U.S. ___, ___, 109 S.Ct. 1378, 1381 (1989)(government is responsible for a *willful* detention).

[14] *See* n.19, *supra*.

[15] *See Sitz*, 110 S.Ct. at 2493 (Stevens, J., dissenting):

> [T]hose who have found -- by reason of prejudice or misfortune -- that encounters with the police may become adversarial or unpleasant without good cause will have grounds for worrying at any stop designed to elicit signs of suspicious behavior.

haps, worth noting that virtually all reported on-board random interdictions occur on buses and trains; police have not subjected first-class airline passengers to these intrusions.

Because bus interdictions are seizures, the searches that follow are as illegal as the unjustified seizure that precedes them. The "consent" to search in this and some of the other bus interdiction cases might, looked at in isolation, have been voluntary under the standard of *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973). It would, nonetheless, be impermissible as the direct and immediate fruit of the preceding illegal seizure. *Wong Sun v. United States*, 371 U.S. 471 (1963); *United States v. Berry*, 670 F.2d 583 (5th Cir. 1982)(*en banc*). There must be "clear and convincing proof of an unequivocal break in the chain of illegality," *Norman v. State*, 379 So. 2d 643, 647 (Fla. 1980), when consent is claimed to validate such a search. No such claim is possible, either in this case or in the other bus interdiction cases of which *amici* are aware.

C. A Prophylactic Rule Barring All Bus Interdiction Programs Is Both Necessary And Appropriate Under The Circumstances

Bus interdiction programs are not the sort of fluid, unpredictable police-citizen encounter for which the Court designed the flexible, case-by-case criteria of *Terry*. Rather, they are part of a carefully conceived program, properly subject to a prophylactic rule. Such programs are already in effect in Florida (*see, e.g., Fields*, 909 F.2d 470; *Bostick*, 554 So.2d 1153; *Avery*, 531 So.2d 182); the District of Columbia (*see, e.g., Felder*, 732 F.Supp. 204; *Cothran*, 729 F.Supp. 153; *Lewis*, 728 F.Supp. 784); and North Carolina (*see, e.g., United States v. Flowers*, 912 F. 2d 707 (4th Cir. 1990); *Rembert*, 694 F.Supp. 163). The procedures are essentially similar because they are copied one from another. *Id.* at 168 (North Carolina officer received special training in bus interdiction techniques from the Broward County Sheriff's Office).

Under these circumstances, a prophylactic rule is eminently practical. It is also appropriate and necessary to protect the large number of innocent bus passengers potentially subject to these interdictions. The reported cases, while only a fragmentary sample, indicate that bus interdictions are becoming an increasingly common occurrence and that large numbers of innocent passengers are being accosted and acceding to police requests to search their luggage. The officers in this case said that bus boarding was an everyday part of their duties, J.A. 5, 13, while in *State v Kerwick*, 512 So.2d 347, 349 (Fla. 4th DCA 1987), the judge found "that just one officer, Damiano, admitted that during the previous nine months, he, himself, had searched in excess of three thousand bags."

The choice of buses and of passengers is, or can be, entirely random.[16] The government, here as in the other bus interdiction cases, "concedes that it lacked any basis for suspecting illegal activity whatsoever," *Bostick*, 554 So.2d at 1158. Thus, we must assume that the vast majority of people subjected to this process, like any random group of citizens, carry no drugs or other contraband.[17]

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[16] At most, the police have occasionally claimed that "[t]heir practice was to look for people that [sic] appeared to be suspicious or unduly nervous." *State v. Carroll*, 510 So.2d at 1134 (Glickstein, J., concurring). More broadly, however, the government consistently asserts the authority to carry out bus interdictions without providing any constitutional justification.

[17] As stated in *Felder*, 732 F.Supp. at 209:

> At stake here are the rights of a large segment of our populace. While I realize that the drug epidemic is of tremendous proportions, it cannot be said that everyone who boards an interstate bus must be deemed a suspected drug

(continued...)

The Constitution forbids stops based on criteria that do not distinguish reasonably suspected lawbreakers from large numbers of innocent travelers. *Reid v. Georgia*, 448 U.S. 438, 441 (1980); *United States v. Miller*, 821 F.2d 546, 550 (11th Cir. 1987). It also protects those innocent travelers from a planned program of police harassment in the guise of a "mere" encounter. This situation, therefore, is exactly the context in which a prophylactic rule is appropriate. The value of a rule, enforced by the exclusionary remedy, is illustrated by the consequences of this Court's decision in *Prouse*, 440 U.S. 648: As soon as the decision was announced, police chiefs instructed their officers to cease the practice.[18]

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[17] (...continued)
courier.

The agent in *Rembert*, 694 F.Supp.at 168, testified that he had boarded 40-50 buses -- though he made only 3 or 4 narcotics arrests. The judge in *Flowers*, 912 F.2d at 710, found that during the prior year Officer Sennett had boarded approximately 100 buses, resulting in seven arrests. Bus interdictions are thus strikingly unlike police measures examined in prior cases, whose impact fell most substantially on those who were in fact the objects of the investigative technique. *See, e.g., Delgado*, 466 U.S. at 223 (Stevens, J., concurring)(20-60% of employees in factories subject to factory surveys were arrested); *United States v. Martinez-Fuerte*, 428 U.S. 543, 564 n.17 (1976)(20% of diverted cars contained undocumented aliens). Rather, they fit the pattern of *Prouse*, 440 U.S. at 660, in which the impact on crime prevention was "marginal at best" or the "symbolic" drug policies excoriated by Justice Scalia in *National Treasury Employees Union v. Von Raab*, 489 U.S. ___, ___, 109 S.Ct. 1384, 1398 (1989).

[18] *See* Kamisar, "Does (Did)(Should) The Exclusionary Rule Rest on a 'Principled Basis' Rather Than an 'Empirical Proposition'," 16 Creighton L.Rev. 565, 660-61 (1983); Mertens & Wasserstrom, "The Good Faith Exception to the Exclusionary Rule: Deregulating the Police and Derailing the Law," 70 Geo.L.J. 365, 399-401 (1981). This Court has long recognized the importance of the exclusionary rule in creating systematic deterrence. *See, e.g., James v. Illinois*, 493 U.S. ___, ___, 110 S.Ct. 648, 655 (1990); *Stone v. Powell*, 428 U.S. 465, 492-93 (1976).

Amici recognize that most Fourth Amendment law involves application of generalized standards, dependent on an assessment of "all the circumstances surrounding the search or seizure," *United States v. Montoya de Hernandez*, 473 U.S. 531, 537 (1985). Accordingly, some issues are simply not amenable to a rule or rote formula, such as the definition of probable cause, *see, e.g., Illinois v. Gates*, 462 U.S. 213 (1983), or of reasonable suspicion, *see, e.g., United States v. Sokolow*, 490 U.S. ___, 109 S.Ct. 1581 (1989); *Florida v. Rodriguez*, 469 U.S. 1 (1984).

Whenever possible, however, the Court should and does try to establish rules to guide police and lower courts and to avoid the "unanalyzed exercise of judicial will." *New Jersey v. T.L.O.*, 469 U.S. 325, 369 (1985) (Brennan, J., dissenting). In *Arizona v. Hicks*, 480 U.S. 321 (1987), it reaffirmed the application of a bright-line test defining what constitutes a search. In *Minnesota v. Olsen*, 495 U.S. ___, 110 S.Ct. 1684 (1990), it rejected the prosecution's proposed 12-part test for legitimate expectations of privacy in favor of the simple rule that an overnight guest has such expectations. Here, too, the Court can and should create, within that broader question of what constitutes a seizure under *Terry* and *Mendenhall*, a small area of certainty.

Absent such a bright-line rule, police will remain essentially free to continue the practice of bus interdiction. In some cases, of course, the trial judge might agree to suppress any incriminating evidence on a fact-specific determination that the police behavior was a seizure. *See, e.g., Lewis*, 728 F.Supp. 784; *Avery*, 531 So.2d 182. Such occasional reversals, however, are unlikely to serve as an adequate deterrent and thus would not effectively protect the innocent passengers subjected to stops and searches.

> It must be realized that it is the law-abiding citizen who readily accedes to the policeman's "search" request to

> demonstrate that he has nothing to hide . . . . he should not be placed in the posture of having to deny those who are there to protect him.

Lewis, 728 F.Supp. at 790.

Such uncontrolled police power is particularly problematic because it involves unbounded discretion by the field officers in choosing which bus to board and which passengers to seek to search. Studies have suggested that such discretion may be exercised in a fashion that disproportionately affects minorities.[19] An abiding theme of this Court's Fourth Amendment jurisprudence is the concern with protecting citizens from unguided police discretion. *Compare South Dakota v. Opperman*, 428 U.S. 364 (1976)(inventory search according to standardized criteria constitutional), *with Florida v. Wells*, 495 U.S. ___, 110 S.Ct. 1632 (1990)(inventory search unconstitutional absent such criteria). *See also Prouse*, 440 U.S. 648; *Martinez-Fuerte*, 428 U.S. 543.

Though the constitutional rights of numerous innocent passengers have been infringed by the operation of bus interdiction programs, the dollar value of the infringement in each case is likely to be too small for effective civil remedies. Further, the typical bus passenger lacks the skills and resources to assert his or her legal rights aggressively.

> [S]uch means of transportation [as buses and trains] are utilized largely by the underclass of this nation who, because of greater concerns (such as being able to survive), do not often complain about such deprivations.

Lewis, 728 F.Supp. at 789. Here, perhaps more clearly than in many other contexts, it is apparent that the sort of prophylactic rule that *amici* propose is necessary to protect "innocent people by eliminating the incentive to search and seize unreasonably." Loewy, "The Fourth Amendment as a Device for Protecting the Innocent," 81 Mich.L.Rev. 1229, 1266-67 (1983).

D. The Public Interest In Controlling Drug Trafficking Is Adequately Protected Under A Constitutional Regime Subjecting Bus Interdiction Programs To Constitutional Controls

The Constitution forbids the government from carrying out the current bus interdiction programs. It leaves the government, however, with a wide array of other means, including searches based on articulable suspicion and consensual encounters in settings less inherently coercive than the cramped quarters of an interstate bus.

As previously noted, bus interdictions are Fourth Amendment stops because of the combined effect of the police activity and the setting in denying the average passenger the felt ability to walk away or otherwise break off the encounter. Those intense situational pressures do not exist in most other settings. "[T]he narrow aisles of interstate buses [do not] as readily as the broad corridors of an air terminal accommodate breaking off a gratuitous police encounter," *Avery*, 531 So.2d at 190 (Glickstein, J., concurring). The police may, on the other hand, seek the cooperation of passengers before

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[19] Murphy, "Encounters of a Brief Kind: On Arbitrariness and Police Demands for Identification," 1986 Ariz.St.L.J. 207; *see also* Greenberg, "Drug Courier Profiles, *Mendenhall* and *Reid*: Analyzing Police Intrusions on Less Than Probable Cause," 19 Amer. Crim.L.Rev. 49 (1981).

This concern is not entirely hypothetical. Insofar as the facts of the reported bus interdiction cases indicate, the defendants all appear to be Black or Hispanic. *See Lewis*, 728 F.Supp. at 786; *Felder*, 732 F. Supp. at 206; *Evans*, 556 N.Y.S. 2d 794. Police departments do not appear to keep records of the identity of the citizens in "unsuccessful" confrontations and searches. The evidence is at least suggestive, however, that police may be using their uncontrolled discretion in a racially biased manner. *See id.* at 796.

they board or after they leave the bus, subject only to a case-by-case determination, under established criteria, of whether a particular encounter has escalated into a seizure. *See, e.g., Rodriguez*, 469 U.S. 1; *Royer*, 460 U.S. 491; *Mendenhall*, 446 U.S. 544.

Even on buses, police may approach passengers, check their destinations and stories, and seek consent to search their luggage so long as they have a "reasonable suspicion [of wrongdoing], based on specific and articulable facts," *United States v. Hensley*, 469 U.S. 221, 226 (1985). The police officers do not need proof positive; they do not even need facts wholly inconsistent with innocence, so long as the factors, as perceived by a trained agent and later articulated to the judge, appear to have adequate evidentiary significance. *Sokolow*, 109 S.Ct. at 1587. Given the relatively low threshold this Court has created for justifying a seizure, a police force genuinely concerned with transportation of narcotics on interstate buses could institute an effective program that limited its intrusions to those passengers who were suspect under constitutionally established criteria.[20] *Cf.*

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[20] Even under the balancing test utilized in *Sitz*, 110 S.Ct. 2481, a bus interdiction plan would have to "embody[] explicit, neutral limitations on the conduct of individual officers," *Brown v. Texas*, 443 U.S. 47, 51 (1979). Current drug interdiction programs provide *no* limits on an officer's choice of target.

> This kind of standardless and unconstrained discretion is the evil the Court has discerned when in previous cases it has insisted that the discretion of the official in the field be circumscribed.

Prouse, 440 U.S. at 661.

This is, moreover, a particularly inappropriate context for allowing a program of stops without individualized suspicion. One reason a controlled program of sobriety checkpoints may be permissible is because we "assume that . . . officials will be unlikely to locate a checkpoint where it bears arbitrarily or oppressively on motorists as a class, (continued...)

Prouse, 440 U.S. at 659 ("[g]iven the alternative mechanisms available . . . we are unconvinced that the incremental contribution of the random [interdictions] justifies the practice").

This Court has long recognized that Fourth Amendment rights

> belong in the catalog of indispensable freedoms. Among deprivations of rights, none is so effective in cowing a population, crushing the spirit of the individual, and putting terror in every heart. Uncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government.

Almeida-Sanchez v. United States, 413 U.S. 266, 274 (1973), *quoting Brinegar v. United States*, 338 U.S. 160, 180 (1948)(Jackson, J., dissenting).

In our zeal to control drugs, we must not forget the Constitution, and we should not "transform this free society into one where travelers must present papers or proffer explanations to be on their way," *Flowers*, 912 F.2d at 712. The program under review seizes large numbers of innocent travelers; it is an "immolation of privacy and human dignity in symbolic opposition to drug use." *National Treasury Employees Union*, 109 S.Ct. at 1398 (Scalia, J., dissenting). It cannot and should not be upheld under the Fourth Amendment.

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[20] (...continued)
Martinez-Fuerte, 428 U.S. at 559. "[T]he breadth of the class subject to [a checkpoint-like] search helps mitigate the barriers to an effective political check on unproductive programs." Schulhofer, *supra* at 110. Transient bus passengers lack such political effectiveness.

CONCLUSION

For the foregoing reasons, *amici* respectfully submit that the judgment of the Supreme Court of Florida in this case should be affirmed.

Respectfully submitted,

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Dated: December 19, 1990

No. 89-1717

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

STATE OF FLORIDA,

Petitioner,

—v.—

TERRANCE BOSTICK,

Respondent.

ON WRIT OF *CERTIORARI* TO
THE SUPREME COURT OF FLORIDA

ADDENDUM TO BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION, THE ACLU OF FLORIDA, NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, AND FLORIDA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, IN SUPPORT OF RESPONDENTS

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On December 19, 1990, *amici* submitted a brief in the above-entitled case that cited, at various points, the district court decisions in *United States v. Cothran*, 729 F.Supp. 153 (D.D.C. 1990), and *United States v. Lewis*, 728 F.Supp. 784 (D.D.C. 1990). *Amici* respectfully submit this addendum to their brief to notify the Court that

the previously cited decisions in *Cothran* and *Lewis* were reversed on appeal on December 21, 1990. *See United States v. Lewis*, Nos. 90-3029, 90-3034 (D.C.Cir. Dec. 21, 1990).

In *amici*'s view, the reasoning adopted by the D.C. Circuit is based on an unduly cramped view of the Fourth Amendment and should be rejected by this Court. In particular, *amici* believe that the D.C. Circuit's opinion in *Lewis* significantly understimates the constraints that are reasonably felt by any citizen, whether innocent or guilty, when confronted by the police in the cramped quarters of an interstate bus about to depart for its next destination.

Additionally, the facts of *Lewis* and *Cothran* are easily distinguishable from the facts of the instant case, as the D.C. Circuit itself acknowledged in its opinion. Explicitly contrasting the record before it with the record in this case, the D.C. Circuit wrote:

> The evidence before us does not suggest that a reasonable bus passenger would find his "business" impeded by the officers' questioning. The officers neither wore badges nor carried visible weapons. *Compare Bostick v. State*, 554 So.2d 1153, 1154, 1157 (Fla. 1989)(seizure occurred aboard a bus where officers wore badges and raid jackets, and one officer held a pistol in a zipper pouch), *cert. granted*, 111 S.Ct. 241 (1990).

Thus, even accepted on its own terms, the D.C. Circuit's decision in *Lewis* is not inconsistent with the conclusion of the Florida courts that the police behavior in this case violated the Fourth Amendment.

CONCLUSION

For these reasons, and for the reasons stated in our original brief, *amici* continue to believe that the decision below was correct and should be affirmed.

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